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Supreme Court of the United States

OCTOBER TERM, 1962

No. 349

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

FLAME COAL COMPANY, CO-DEE COAL COMPANY AND AMANDA COAL COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1962

No.

UNITED MINE WORKERS OF AMERICA,
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FLAME COAL COMPANY, CO-DEE COAL COMPANY
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

United Mine Workers of America, Petitioner herein (called "UMW"), prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit,[1] entered in Case No. 14,498, styled *Flame Coal Company, Co-Dee Coal Company, and Amanda Coal Company, Plaintiffs-Appellees,*[2] v. *United Mine Workers of America, Defendant-Appellant,* on May 21, 1962, wherein the Sixth Circuit modified and affirmed a judgment entered by the United States District Court for the Eastern District of Kentucky,[3] on July 29, 1960.

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[1]Herein called either "Court of Appeals" or "Sixth Circuit".

[2]Plaintiffs-Appellees are called "Flame", "Co-Dee" and "Amanda", respectively. Collectively, they are called "Companies".

[3]Herein referred to as the "trial court" or "district court".

of $104,845.00, of which $54,845.00 was for compensatory and $50,000.00 for punitive damages, "upon condition that plaintiffs remit all compensatory damages in excess of $8,225.00", and affirming said judgment "as so modified", and on June 15, 1962, wherein it noted that Plaintiffs-Appellees had released and remitted said sum of $46,620.00, it ordered "the judgment of the District Court entered July 29, 1960, be reduced to $8,225.00 compensatory and $50,000.00 punitive damages, and, as so modified, the judgment of the district court is hereby affirmed."[4]

A certified appendix record in said case, together with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with the Rules of this Court.

OPINIONS BELOW

The Sixth Circuit's opinion appears in Appendix A to this petition, at page i, *et seq.*; in the Certified Appendix Record;[5] and it is reported in 303 F. 2d 39.

The district court's memorandum is found in the Certified Appendix Record at pages 67-71a.[6]

JURISDICTION

The judgments entered by the Sixth Circuit, of which complaint is made herein, were entered on May 21, 1962 and June 15, 1962. This Court's jurisdiction is invoked under 28 USCA Sections 1254(1) and 2101(c).

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[4] Judgments of both the Sixth Circuit and the district court appear in Appendix B hereto, page xiii, *et seq.* The Sixth Circuit's judgments are found at pages xiv-xv.

[5] The abbreviation "R." denotes the Certified Appendix Record.

[6] The district court memorandum dealt with UMW's motion for judgment or, in the alternative, for a new trial (R. 62a), which the district court overruled (R. 71a).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

Plaintiffs-Appellees predicated the district court's jurisdiction upon "the provisions of Section 303 of the Labor-Management Relations Act of 1947' (29 U.S.C.A., Section 187)" [R. 6a].

QUESTIONS PRESENTED

1. In an action instituted in a federal district court by an employer against an unincorporated labor union in its common name for damages and the district court's jurisdiction is asserted under Section 303, Labor-Management Relations Act, 1947, and there is no diversity of citizenship of the parties (a) does the district court have jurisdiction, power and authority under the doctrine of pendent or ancillary jurisdiction to determine the issues in a non-federal tort action joined with a claim under said section, where state courts in the state in which the alleged wrongful conduct occurred and wherein the federal district is sitting would not entertain jurisdiction of a suit based upon the non-federal claim against the union in its common name; and (b) does the doctrine of federal preemption preclude the applicability of the pendent or ancillary jurisdiction in such action?

2. In an action instituted in a federal district court under Section 303 by an employer against a labor union for damages, and there is joined with a claim thereunder a non-federal, common-law action for tort, did the evidence suffice as a matter of law to support a finding and conclusion that the union had engaged in a secondary boycott under the federal statute?

3. In an action for damages instituted in a federal district court under Section 303, Labor Management Rela-

'Herein called "Act".

tions Act, 1947, wherein a claim thereunder is joined with a non-federal, common-law action for tort, does the court have jurisdiction, power and authority to enter judgment on a jury verdict awarding punitive damages (a) under Section 303 and (b) if such damages are not recoverable under that section, does the doctrine of federal preemption preclude the entry of a judgment based on such award arising out of the non-federal, common-law action?

4. In an action for damages instituted under Section 303, Labor Management Relations Act, 1947, by an employer against a labor union, wherein there is joined with a claim under the federal statute a non-federal, common-law action for tort, did the trial court commit reversible error in refusing an instruction profferred by the union charging the jury on the elements essential to a finding that the statute has been violated, when the court's charge to the jury failed to include such essential elements, and the jury has returned a general verdict of liability against the union?

STATUTES INVOLVED

Pertinent statutory provisions involved herein are Section 2(2) and (3), Section 13 and Section 303 (a) and (b), Labor Management Relations Act, 1947 [29 USCA 152-(2) and (3), 163 and 187 (a) and (b)], and appear in Appendix C hereto, page xvi, *et seq.*

STATEMENT OF THE CASE

1. The pleadings, trial proceedings and the Sixth Circuit's judgments

Asserting the district court's jurisdiction under the Act's Section 303, Companies sued for compensatory and punitive damages for secondary boycott and for the common law tort of wrongful interference with Companies'

business (R. 6-12a). UMW's Answer asserted the district court had no jurisdiction of the subject matter or over UMW; it declared "there is no basis for jurisdiction to adjudicate any non-federal cause of action" and the complaint "does not state a cause of action under the Constitution, laws or treaties of the United States"; that diversity of citizenship between the parties plaintiff and defendant was lacking as to any common-law tort claim; that Companies could not recover punitive damages under the Act's Section 303; and it denied every material allegation in the complaint (R. 12-14a).

In a jury trial, UMW's motions for directed verdict (R. 352-3a, 462a) were overruled (R. 356a, 462a), as was UMW's motion to strike all evidence of incidents occurring at mines or property other than those of Companies, and incidents which failed to show any connection with UMW (R. 350a). The court refused to read to the jury UMW's Instructions I through XI and XIII, except it gave a portion of Instruction VIII (R. 463-9a). After charging the jury (R. 469-83a), UMW excepted to portions of the charge, which the court overruled (R. 483-4a). Upon a jury's general verdict against UMW, the district court entered judgment upon the jury award of $54,845.00 compensatory damages and $50,000 punitive damages (R. 62a). Thereafter, UMW's motions (R. 62-5a) for an order setting aside the jury verdict and vacating and setting aside the July 29, 1960 judgment, and for judgment in accordance with UMW's motions for a directed verdict, or in the alternative, for a new trial were overruled (R. 71a) on December 22, 1960, the district court filing its memorandum (R. 67-71a). UMW appealed from the judgments and orders of July 29, 1960 and December 22, 1960 (R. 72a).

On May 21, 1962, the Sixth Circuit filed its opinion

(Appendix A, p. i, *et seq.*) and entered its order (Appendix B, p. xiv), in which it adjudged that

> "if plaintiffs-appellees shall file in the District Court a remittitur . . . of $46,620.00 from the judgment for compensatory damages, and shall cause a certified copy of such remittitur to be transmitted to this Court . . . the judgment of the District Court will be reduced to $8,225.00 compensatory and $50,000.00 punitive damages; and, as so modified, will be affirmed . . ."

Remittitur was required because the Sixth Circuit found "there was not evidentiary foundation for an award of damages for lost profits" (A. x).

The Sixth Circuit's judgment of June 15, 1962, first noting that "plaintiffs-appellees filed a remittitur in the District Court . . . by which the plaintiffs-appellees released and remitted the sum of $46,620.00 from the judgment for compensatory damages", ordered (Appendix B, p. xiv-xv)

> ". . the judgment of the District Court entered July 29, 1960, be reduced to $8,225.00 compensatory and $50,000.00 punitive damages, and, as so modified, the judgment of the district court is hereby affirmed".

2. The issues and how they were decided:[a]

a. The issue of jurisdiction of the non-Federal cause of action.

Though the complaint predicated the district court's jurisdiction only under the Act's Section 303, Companies

[a] Other issues presented on appeal in the Sixth Circuit included (1) the admissibility of evidence of incidents at mines and properties other than those belonging to Companies, evidence of dynamitings and pictures thereof and of shooting near Flame's tipple, (2) instructions to the jury concerning damages and the refusal of UMW instructions concerning future profits, (3) the sufficiency of evidence to support the non-federal claim, and (4) the denial of UMW's motion for the production of Companies' records and the right to inspect and copy documents.

sought damages not only under that statute but also, and as the Sixth Circuit stated (A. i), "for the common law tort of wrongful interference with business". Both the Sixth Circuit (A. iii-iv) and the district court (R. 67-9a, 353-6a, 462a) rejected UMW's contention (R. 12-14a) "there is no basis for jurisdiction to adjudicate any non-Federal cause of action". Both courts relied upon *Hurn* v. *Oursler*, 289 U. S. 238 (R. 68-9a; A. iii-iv) and prior Sixth Circuit cases.[5]

None of the opinions in these cases, however, dealt with the crucial question whether the doctrine of ancillary or pendent jurisdiction was applicable in a situation where, as herein, the state in which the alleged wrongful acts were asserted to have occurred, namely, Kentucky, would not have permitted a voluntary unincorporated labor union [as the complaint (R. 7a) describes UMW] to be sued in its common name.

Though the Sixth Circuit did not express disagreement with UMW's contention that Kentucky state courts would not have entertained a suit against UMW for the alleged common-law tort claim, nor did it challenge UMW's further contention that diversity of citizenship was totally lacking, nevertheless it declared (A. iv)

> "federal jurisdiction attached here because of the secondary boycott and under Rule 17(b) F. R. Civ. P. defendant, an unincorporated association, is suable as such and in the federal court may be made to respond in damages for its tortious conduct",

ignoring the language of Rule 17(b)(1) that a suit thereunder was only "*for the purpose of enforcing* for or

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[5] *UMWA* v. *Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. den. 359 U. S. 1013; *UMWA* v. *Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U. S. 881; *Gilchrist* v. *UMWA*, 6 Cir., 290 F. 2d 36, cert. den. 368 U. S. 875.

against [an unincorporated association] *a substantive right existing under the Constitution or laws of the United States*" (A. xviii)—not to enforce a state common-law action.

In addition, UMW asserted that the doctrine of federal preemption precluded the applicability of the *Hurn* doctrine. Nothing contained in the Sixth Circuit's opinion responded to that contention.

b. The issue of liability under the Act's Section 303.

In the district court (R. 63a) and in the Sixth Circuit UMW contended that under applicable law the evidence did not suffice as a matter of law to warrant a finding that UMW had injured Companies' property and business within Section 303's meaning. It contended that picketing at Flame's tipple was permissive primary picketing, not secondary picketing within Section 303, that under that Section violence was no test of responsibility, that that Section contemplated concerted action which was lacking, that inducement of employers was not condemned, that truckers hauling coal to Flame's tipple were neither "other" nor "neutral" employers with respect to Companies, that incidents relating to train crews did not fall within the Section's scope, and that therefore UMW's motions for directed verdict should have been sustained because there was no evidence of a Section 303 violation.

UMW argued that picketing at Flame's tipple was permissive primary picketing since District 30 sought to obtain contracts not only from Flame, but also from Co-Dee and Amanda, as well as from those employers who themselves hauled the coal from Co-Dee and Amanda to Flame or hired employees to do so. In dealing with the

"Unless otherwise indicated, all emphases herein are supplied.

secondary boycott issue, "Was there proof of a secondary boycott?", the Sixth Circuit declared (A. iv):

> "It is sufficient to say that the general objective of defendant was to require Flame to sign the union's contract. Co-Dee and Amanda were separate entities from Flame, as were the individual truckers and trucking companies."

The Sixth Circuit did not restrict its finding of liability or the issue of secondary boycott to the proof of events which related to picketing activities concerning the dispute between District 30 and Companies. Instead, it emphasized activities at mining operations other than on Companies' property, despite the Sixth Circuit's opinion admission that Companies "were among one hundred and seventy-six (176) coal companies . . . which had not signed" the 1958 Agreement (A. ii), and the undisputed evidence that District 30 was endeavoring to obtain a contract from each of the other operations, and the fact there is a total lack of evidence that Companies and the other employers had any business relationships whatsoever. However, in its answer to the inquiry whether there was proof of a secondary boycott, the Sixth Circuit continued the language above quoted, adding (A. iv):

> "This union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the organization of all involved, whether producers, transporters or processors of coal. *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F (2) 716, 723."

c. The issue of punitive damages.

UMW challenged the punitive damage award of $50-000.00 damages on grounds that (1) punitive damages were not allowable for a Section 303 violation and (2) that the doctrine of federal preemption precluded any

award of such damages under the common-law rule in Kentucky.

UMW contended that since jurisdiction was predicated upon Section 303, punitive damages could not be allowed for any violation under that Section. The district court concluded (R. 69a) that "nothing in the statute indicates that punitive damages should not be awarded, especially when a violation of the Act is coupled with a common law tort for which punitive damages can be awarded", and reasoned that, absent specific language in Section 303, punitive damages were properly awarded under the Sixth Circuit's *Osborne* and Kentucky's common law (R. 70-1a). Although the Fourth Circuit's *UMWA* v. *Patton*, 4 Cir., 211 F. 2d 742, cert. den. 348 U. S. 824, had specifically held that punitive damages were not recoverable in a Section 303 action, and while nothing in the Sixth Circuit's opinion expressly held UMW had violated the common law of Kentucky, the Sixth Circuit approved the punitive damage award, relying upon the Sixth Circuit's *Osborne* and *Gilchrist* cases. It ignored the Fourth Circuit's *Patton*.

Since Companies had asserted pendent jurisdiction of the non-federal, common-law action was warranted under the doctrine of *Hurn* v. *Oursler*, because both federal and non-federal claims "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances," UMW contended in the Sixth Circuit that Congress, by enacting Section 303, had precluded an award of punitive damages for activity covered by that Section, and that under the doctrine of federal preemption the district court was without power, authority and jurisdiction to approve a jury verdict of punitive damages. The Sixth Circuit's opinion is silent concerning this conten-

tion, although in neither *Osborne* nor *Gilchrist* did the Sixth Circuit discuss this issue.

d. The issue of whether the court committed reversible error in refusing to charge the jury on the elements essential to a Section 303 violation and in failing to include such elements in its charge.

Since Companies charged a Section 303 violation, UMW offered, but the district court refused to give to the jury, Instruction IV, containing the elements essential to a violation of that Section (R. 466a) by which, the jury would have been instructed that unless the jury believed the strike and picketing had for its object, either to force plaintiffs to cease doing business with another person or to force plaintiffs and other employers to recognize the union as representative of their employees, it would find for UMW. Instead, in defining a secondary boycott, the jury was told merely that (R. 474a),

> "Very simply, a secondary boycott is a threat to inflict damage upon an employer between whom and his employees no dispute exists. In order to bring him against his will into a concerted plan to inflict damage upon another employer, who is in dispute with his employees."

The court explained that Companies (R. 474a)

> "had a right to employ union labor, or not to employ union labor, but the union did not have any right to inflict damage or injury upon that property in order to induce those miners who were working for these plaintiffs to join the union, or to bring about the joining of the union by any other employer or employee who was in the same kind of business. That is what you call a secondary boycott".

Nowhere in its jury charge, did the district court tell the jury a prerequisite to a violation under Section 303 was its finding that strike activity must have had for its *object*

the achievement of a result proscribed in that section, despite UMW's exception to the charge on this ground (R. 484a).

Though UMW contended in the Sixth Circuit that joinder of the common-law claim with the Section 303 claim demanded that the district court provide the jury with clear and precise guides so as to acquaint the jury with the distinctions involved between a Section 303 violation and one offensive to the Kentucky common law and that a trial court's duty is to charge the jury correctly on material issues, the Sixth Circuit, ignoring this issue, declared only "We discuss such [of the questions involved] as we consider require it" (A. iii).

3. The Evidence

a. District 30 attempts to obtain contracts at 176 mines.

In the Spring of 1959, UMW's District 30 sought to obtain as signatories to the National Bituminous Coal Wage Agreement of 1950, as amended in 1958, 176 mines in that District. Co-Dee, Amanda and Flame, three Kentucky corporations (R. 73a) employing 23 men (R. 92a) and controlled, as the Sixth Circuit declared, by Virginia C. Collins (R. 74a; A. i) were among them.[10] Co-Dee and Amanda engaged in auger mining, and coal produced by them was transported some 10 to 14 miles to Flame's tipple located at Bellcraft, Letcher County, Kentucky (R. 74a), where the coal was processed (R. 92a) and put into railroad cars and sold through Flame (R. 74a). Truckers who hauled the coal were paid by the ton (R. 75a, 223a, 229a, 256a, 262a).

[10] As the Sixth Circuit noted, Virginia C. Collins is the principal stockholder of each of the three corporations. Flame is owned by her and her husband (R. 127a). She owns Co-Dee except for 25 shares ($100.00 par value) which she gave to a young man (R. 128-9a, 141a). In addition to Mrs. Collins, Amanda has three stockholders, one of whom is the young man above noted (R. 127a, 141a).

District 30's President Carson Hibbitts, whose duty was to get in new members from employees at the 176 mines, as well as to sign those mines up (R. 358a), invited local union officers and members to attend meetings on March 14 and 15, 1959, and stated a picket line would have to be established and, as the Sixth Circuit stated (A. iii), defendant's "witnesses testified of instructions given to the members of the convoys to behave themselves and not violate the law"; and there is no challenge of such testimony. District 30's field representative Matt Combs was in charge of organizing the motorcades. Other District 30 field representatives participating were Bill Perkins and Joe Davis.

Coal operators,[11] including Companies[12] and persons hauling coal for them,[13] were armed with rifles and shotguns; and an operator kept German Police dogs around his mines (R. 240a). Knowing that some coal operators had purchased ammunition, and, explaining "there was safety in numbers" (R. 362a), Hibbitts authorized the use of convoys.

b. The convoy.

The convoy was organized on March 16 near Hazard, Kentucky (R. 389a). District 30 field representative Matt Combs and Bill Perkins admonished the men to be peaceful. A state trooper heard Combs on several occasions tell the convoy UMW was going to get a contract signed, "they wouldn't work without" one, they were to keep visiting the tipples and ramps and mines and keep the coal from moving out of the county, and that "by picketing these places" they believed the movement of coal would stop (R. 146-7a). The state trooper admitted Combs made no "threat of violence" (R. 146a).

[11] R. 237-8a, 404a, 409a.
[12] R. 134-5a, 185a, 210a, 217a, 226a, 237-8a, 260a.
[13] R. 186-7a, 238a, 261a, 262a.

Motorcades met at Darfork, Kentucky, each morning, where instructions similar to those detailed were given pickets. After a few days, different persons were designated to go in different directions (R. 150-1a), but always with instructions "to be peaceful", "not to drink" and "not to be armed", and no instructions at variance therewith were ever given (R. 390a). A state trooper testified that Combs, on numerous occasions, asked the men to cooperate with police and not violate the laws (R. 203a).

State police followed each of the motorcades each day (R. 391a). A state trooper admitted the convoys were generally orderly (R. 159a) and no firearms were seen in the possession of those who participated in the motorcades (R. 158a, 205a, 390a, 399a). Though there were approximately 125 state police in the area, only one man was arrested but never tried (R. 205a); no arrests of miners in the convoys were made (R. 206a); no firearms were seen in the possession of those in the motorcades; and at least two state police complimented District 30's field representative Combs several times on the pickets' behavior (R. 203a, 392a).

c. The Events at Flame's Tipple.

Beginning March 16, 1959, and for some time thereafter, picketing took place at Flame's tipple and property at Bellcraft (R. 91a). On that day Flame had six employees on its tipple (R. 92a) and according to Mrs. Collins she found 60-odd men milling around and her employees in the scale house. The next day, Mrs. Collins related, Flame was visited by a motorcade led by District 30 field representative Joe Davis whose testimony is that the pickets were peaceful and even Mrs. Collins admits there was no violence (R. 143a). The undisputed testimony is that employees were told the men "were striking

for higher wages and better working conditions" (R. 210a, 216a).

One Flame employee related he too saw Davis, and though charging Davis as saying "we would have to close the company down until it went under U.M.W.A. contract" (R. 183a), which Davis denied (R. 405-6a), the employee admitted that upon telling Davis "that was between him and Mrs. Collins" (R. 183a), the men left and admittedly without any threat from Davis (R. 188a). Another employee attributed to *an unidentified man* the statement "he would like for us to cut the trucks off until we signed the contract (R. 207a) and to tell the drivers not to go back and get any more coal, which he did (R. 207a). A third employee related the men were without a spokesman, they were trying "to talk at once" and that "they [without identifying any one] said if we went back to work there would be some trouble", and though saying he "was afraid to go back", he admitted "we started to run more coal" about a week later (R. 213a).

Witnesses for Companies testified they experienced shooting at Bellcraft. The Sixth Circuit admitted that "Specific identification of the riflemen in the hills . . . was not made" (A. iii).

One *truck driver employee* (R. 219-22a), five *truck owners or employers* (R. 222-6a, 229-32a, 257a, 258-60a, 261-3a)[1] and an equipment supplier (R. 254-6a) *testified* concerning shooting experiences when their respective trucks undertook to deliver coal at Flame's tipple. The Sixth Circuit noted (A. ii) shooting was from both sides of the hill (R. 248a); and though a state trooper admitted state police have a means of ballistic tests by which to de-

[1] One truck owner admitted the non-union operators were working together to fight the Union (R. 237a) and he devised a plan among them "to use lawsuits to fight the union and to get evidence to support lawsuits" (R. 239a).

termine whether bullets come from a particular gun (R. 250a), he had not investigated the scenes pointed out to him, and he admitted Virginia Collins never asked him to go into the woods to ascertain whose cartridges had been fired from the hillside (R. 253a). No one was hit (R. 218a, 251a, 255a, 261a, 265a).

Companies' witnesses testified also that railroad tracks were dynamited and damaged on eight occasions (R. 162-3a, 171-2a, 267a) even though witnesses did not know who had damaged the tracks (R. 163a, 174a); and when pictures of dynamitings were admitted over UMW objections on the ground "there is no evidence that would connect any United Mine Worker with any of this", the trial court, agreeing, said, "That is correct, naturally, and if he doesn't tie it in, he doesn't have any case (R. 103a).

Incidents relating to the L & N train crew.

Witnesses testified L & N train crews did not operate trains because of the picketing. An L & N inspector police related that at Bellcraft on several occasions (R. 161a) he saw pickets on or about the rail lines serving the tipple, that they would run up and take hold of the switch, the railroad crews would then stop the train, pickets and train crew would talk, and then the crews would refuse to serve the mine (R. 160-1a). There was evidence, too, that on two occasions the pickets told a trainmaster "we're just not going to let you go in there", and that the crowd was disorderly (R. 167a, 178-9a). At Chavies, a man identified only as "Feltner" approached a train crew about to pick up railroad cars, and the crew then refused to cross the picket line (R. 156a), while at Colson, a train crew, coming to "pick up some loads", would not cross the picket line when they saw an on-strike sign (R. 157a, 549a). At Sassafras,[15] when a train

[15] Chavies, Colson and Sassafras are all in Kentucky.

crew left the train and supervisory personnel took over, a witness testified the pickets "gave a lot of verbal abuse" (R. 157a). The Sixth Circuit declared (A. ii) that "Mass picketing at the Flame tipple prevented the processing of coal there". That court ignored the undisputed evidence that traditionally and universally railroad men will not cross a picket line and, with such knowledge, supervisory railroad employees were available in the strike area (R. 164a, 165a, 174a, 181a).

Evidence relating to activities at mining operations unrelated to Companies' operations and having no business relationships with either Flame, Co-Dee or Amanda.

There was evidence of activities at mines of other companies which were unrelated to Companies' operations and which had no business relationships with either Flame, Co-Dee or Amanda.

At mines approximately ten or eleven miles away from the Virginia Collins mine (R. 285a) the record contains evidence of large groups of pickets at Gem-Elkhorn at Colson, Kentucky, on March 16 led by Bill Perkins (R 272a); pickets in 30-35 cars, at Roland Price's tipple, headed by Joe Davis on March 17 to see if he would sign a contract, a picket line was established across the highway when he refused, and men were called "scabs and yellow dogs" (R. 274-6a); on another occasion there were 700 or 800 pickets led by Perkins when three employees were beaten (R. 234a, 277a) and Perkins was described as doing nothing to stop it (R. 277a); pickets attempted to turn over two truck loads of coal which were later dumped by the drivers at the pickets' instance (R. 287-8a); another truck driver, requested to dump his coal, was thrashed and Perkins did nothing to stop it (R. 278-9a), tires were cut, employees were run away from the

tipple, and the men left when Perkins got into his car (R. 279a).

On March 17 or 18, according to a state police, at Colson a large number of pickets were at Roland Price's ramp; approximately one-fourth of a mile away police found the road blocked by cars and a state trooper pleading with a group of 25 to 30 men attempting to turn over a coal truck;[*] truck tires were cut but the police did not know who had cut them; he saw an injured man although he did not testify how the man was injured or by whom; he asked Perkins to talk to the men, which Perkins did, although, as the state police stated, "it was quite a while before he did so" (R. 189-95a). However, the trooper admitted he heard no threats to any employees (R. 195a).

Two or three days later, the trooper testified, there was a repetition of the same incident (R. 195a) the operation was shut down, the road blocked, and Perkins was present (R. 195a). The trooper estimated there were 500 pickets there. *Perkins immediately unblocked and helped* the trooper unblock the road, and pickets dispersed when Perkins talked to them (R. 196a).

On March 24, the trooper related, there were 1,000 to 1,200 pickets at Colson; pickets obeyed the police at first but later "cut across the field", causing the police to line up and, as one testified, "from there we stood 'em off" (R. 196a). Perkins was there; though a police stated he made no attempt to cooperate (R. 196a), another state trooper testified Matt Combs importuned the men to leave (R. 153-4a). Asked if he saw any firearms, the trooper answered he had seen one in the hands of an employee who "worked for the mine" (R. 158a). However,

[*]According to Perkins, and no evidence disputes him, the men involved in the truck incident were not in the motorcade (R. 402a). Perkins asserted, at the police request, he asked them to quit and they did (R. 400a).

Combs testified the situation was tense because "There were truck drivers laying behind the trucks with rifles and shotguns, and machine guns" (R. 395a).[17]

Perkins was placed too, at Combs, Kentucky, where a state trooper, believing the pickets "are out of hand", had difficulty in persuading the men to go "back up on the highway and disperse", which they did after Perkins told them to do so (R. 197-8a).

Companies' witnesses also related an incident at Mayking, Kentucky, when 50 to 100 men followed trucks; one or two had horsewhips; and "the boys came off empty" (R. 233a).

There was evidence too that operators other than Companies had property destroyed at Kona and Blackey, Kentucky, by fire and explosion (R. 283a), and also at Sunfire, Sassafras and Viper (R. 198a). A truck driver who hauled coal for Mrs. Collins, testifying his truck was dynamited while it was at his home, admitted he did not know who had dynamited it (R. 287-8a). Further, Companies' witnesses related shooting experiences at other mines but were not able to identify the ones who did it (R. 263-5a, 267-8a).

In the district court, the jury was told that the evidence as "to these other incidents" could be used "to establish the responsibility for the incidents occurring at the plaintiffs' operation" (R. 476a). The Sixth Circuit not only concluded there was "evidence from which the jury could infer and find that defendant union was the author of, and responsible for, the violence and illegal conduct which effectively interrupted and interfered with the business of plaintiffs" (A. iii), but, on the issue of

[17] Combs also related that feeling ran high among some of the miners because some of them who had worked "for as long as thirty years" were discharged and ordered to vacate their houses and that naturally that would cause the men to be tense and high strung (R. 396a).

whether there was proof of secondary boycott, it declared that (A. iv), "This union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the organization of all involved, whether producers, transporters or processors of coal".

Reasons for Granting the Writ

I.

There is presented herein a federal question important in the construction and administration of the Act's Section 303, in that herein the Sixth Circuit has sanctioned a federal district court's assumption of jurisdiction, power and authority over a state common-law tort claim against an unincorporated labor union, even though diversity of citizenship of parties is lacking and even though the district court is sitting in a state in which the claim allegedly arose and which does not regard the unincorporated labor union as a jural entity and would not have permitted such an association to be sued in its state courts in its common name on such common-law tort claim.

In *Guaranty Trust Co.* v. *York*, 326 U. S. 99, this Court declared that "a federal court adjudicating a State-created right . . . is for that purpose, in effect, only another court of the State" and that "*it cannot afford recovery if the right to recover is made unavailable by the State*" (326 U. S. 108-9). Therein, this Court admonished that, "the accident of a suit . . . in a federal court instead of in a State court a block away should not lead to a substantially different result" (326 U. S. 109). The Sixth Circuit's result herein is in direct conflict with this Court's foregoing professions.

The Sixth Circuit in prior cases has permitted such suits under the doctrine of pendent or ancillary jurisdic-

tion,[9] though opposed by UMW, but in such cases the common-law claim has arisen in states which permitted labor unions to be sued as such. Herein, however, the acts complained of by Companies occurred in Kentucky; the complaint itself described UMW as a voluntary unincorporated labor organization, and Kentucky does not regard it as a jural person subject to suit. *Diamond Block Coal Co. v. UMWA*, 222 S. W. 1079 (Ky. 1920); *Local Union No. 500* v. *Wise*, 269 S. W. 2d 721 (Ky., 1954).[10] Indeed, the Kentucky rule was employed by the federal district court for the Western District of Kentucky in *Sanders* v. *International Assn. of Bridge, etc. Iron Workers*, DC, W.D., Ky., 1954, 120 F. Supp. 390, 392, and *Lyons* v. *Sanders*, DC, W.D., Ky., 1954, 120 F. Supp. 392, to reject federal court jurisdiction because of a lack of citizenship. *Sanders* expressly states, "Under Kentucky law, naming the International Association as a defendant in its union name did not make the Union and the members thereof parties to the action" (120 F. Supp. 392).

Congress delineated in 28 USCA 1332 (A. xvi) those instances in which federal district courts may assume jurisdiction in non-federal cases. The diversity of citizenship which that section demands in non-federal actions is lacking herein between Companies and petitioner UMW, since UMW's citizenship must be determined by the citizenship of its individual members. *Underwood* v. *Maloney*, 3 Cir., 256 F. 2d 334; *Lowry* v. *International Bro. etc.*, 5 Cir., 259 F. 2d 568. Since Kentucky does not permit UMW to be sued in its common name, the Third

[9] *Meadow Creek, Osborne*, and *Gilchrist*, *supra*, fn. 8 (*ante*, p. 7). In *Gilchrist*, related activities occurred both in Tennessee wherein a union may be sued and in Kentucky in which it may not be sued. Though UMW argued it "may not be sued as entity in Kentucky", *Gilchrist* did not discuss the issue.

[10] See *Sweeney* v. *City of Louisville*, 309 Ky. 465, 218 S. W. 2d 30, where the Kentucky court rejected an action brought against an association as such.

Circuit's *Underwood* reminds that "The employment of the methods prescribed" by the state "is not permissive but is mandatory and exclusive" (256 F. 2d 342).

The Sixth Circuit declared herein (A. iv) that "federal jurisdiction attached here because of the secondary boycott and under Rule 17(b). F.R.Civ. P. defendant, an unincorporated association, is suable as such and in the federal court may be made to respond in damages for its tortious conduct (29 U.S.C.A. 187)." But, the Sixth Circuit was responding, as its opinion indicates (A. iv), to UMW's contention that "there being no diversity of citizenship . . . jurisdiction in the federal court could not attach as to the common law action", and the Sixth Circuit's citation of Rule 17(b) does not and could not sustain the jurisdiction as to the common law action. To reach its conclusion the Sixth Circuit has had to ignore, first, the Rule's language (A. xviii) that its permission is only "for the purpose of *enforcing* for or against [an unincorporated association] *a substantive right existing under the Constitution or laws of the United States*" and, secondly, Rule 82, Federal Rules, which expressly states "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . .", in addition to the circumscriptions which Congress placed upon district court jurisdiction in 28 USCA 1332. Its jurisdictional sanction finds challenge in the Sixth Circuit's own pronouncement in *McPherson* v. *Hoffman*, 6 Cir., 275 F. 2d 466, 470, that in a diversity case, what a plaintiff could not do directly "could not be done for him indirectly".

Not only does the Sixth Circuit's approval of the district court's jurisdiction of the non-federal claim stand in direct conflict with 28 USCA 1332 and Rule 17(b), as well as *Underwood* and *Lowry*, but it is challenged by *Barlow* v. *Roche et al*, D.C., Mun. Ct. of Appeals, 1960,

161 A. 2d 58 (appeal petition denied by the District of Columbia Circuit, October 7, 1960) holding that where a state denies an action against a labor union in its name under common law, a plaintiff does not have a substantive right which it may use as a predicate for an action in a federal court.

An additional and totally different aspect of the jurisdictional question lies in UMW's contention that the *doctrine of federal preemption* precludes the applicability of *Hurn* v. *Oursler*, 289 U. S. 238, upon which the Sixth Circuit relied to sustain the district court's non-federal jurisdiction herein and in its previous *Meadow Creek*, *Osborne* and *Gilchrist* cases. *Though pressed upon the Sixth Circuit herein, it made no response thereto.* The saliency of UMW's contention is clear.

Hurn's rationale, which permitted a federal court to deal with both a non-federal and a federal claim in the same case stemmed from this Court's doctrine of "judicial economy" and its thesis that both claims "so precisely rest upon *identical facts* as to be little more than the *equivalent of different epithets* to characterize the same group of circumstances" (289 U. S. 246). Hence, as UMW argues, the assertion of jurisdiction of the non-federal claim must necessarily collide with the doctrine of federal preemption, for if the non-federal claim be supported by evidence reflecting a Section 303 violation, then Congress has occupied the field of the type of conduct involved in that section and it thereby foreclosed state court jurisdiction to entertain a common-law tort action for damages based thereon. This is emphasized because, unlike *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U. S. 656, in which this Court rejected the preemption doctrine on the ground the Act "sets up no general compensatory procedure", in the instant case the "general compensatory

procedure" is supplied in Section 303 upon which Companies based their right of recovery and the district court's jurisdiction. Indeed, *Laburnum* observed that "one instance in which the Act prescribes judicial procedure for the recovery of damages . . . is that with reference to the jurisdiction of federal and other courts to adjudicate claims for damages resulting from secondary boycotts" (347 U. S. 665). In *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236, this Court implemented the federal preemption doctrine and recognized that *Laburnum's* opinion "found support in the fact *the state remedy had no federal counterpart*" (pp. 247-8).

Since Congress was not indifferent to the phase of damages resultant from conduct violative of Section 303, pertinent are the teachings of *Sherlock* v. *Alling*, 93 U. S. 99, 104, that "Whatever . . . Congress determines, either as to a regulation *or the liability for its infringement is exclusive of state authority*" and of *Pennsylvania R.R. Co.* v. *Public Service Commission*, 250 U. S. 566, 569, that "when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the States no more can supplement its requirements than they can annul them." So, too, in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, this Court has declared that where a federal statute condemns an act as unlawful, the legal consequences are federal questions, the answers to which are derivatives from the federal statute and policy and conflicting state law and policy must yield.

The Sixth Circuit's approval herein of federal district court jurisdiction over state common-law claims is in conflict with this Court's recognition in *Local 1976, United Bro. of Carpenters* v. *NLRB*, 357 U. S. 93, 98, that in enacting Section 303 Congress rejected the extension of federal jurisdiction beyond "specific union conduct

directed to specific objectives" expressly set forth in that section. Indeed, Section 303's legislative history[19a] records that as originally proposed and passed in the House of Representatives, federal district courts would have been vested with jurisdiction to try damage actions based upon causes of action involving virtually every type of interference arising in the course of a labor dispute, but Congress did not adopt the House proposal and wittingly withheld from federal courts jurisdiction to try damage actions based upon union conduct not condemned in Section 303. But despite such congressional action and notwithstanding the total lack of any legislative indicant of congressional intent to vest federal district courts with ancillary or pendent jurisdiction to determine common-law actions cognizable in state courts in connection with alleged causes of action based upon Section 303, the Sixth Circuit has achieved for federal district courts "that which Congress refused to enact into law", a device which this Court refused to adopt in *Colgate-Palmolive-Peet Co.* v. *NLRB*, 338 U. S. 355, 364.

There are currently pending in federal courts, district and appellate, 27 cases[20] involving claims for compensatory damages aggregating in excess of 7 million dollars and for punitive damages aggregating in excess of 3 million dollars, and all of the 27 cases are concerned with the same issue of federal preemption involved herein. Nineteen of the cases are pending in federal district courts in Kentucky and West Virginia and pose the same problem of jurisdiction posed herein, whether, absent diversity, federal district courts have jurisdiction of a

[19a] See Legislative History of the Labor Management Relations Act, 1947, Vol. I, p. 158, 204. Section 12 of H. R. 3020, as passed by the House, is copied in the Appendix to this brief, p. xix.

[20] These cases are set out in detail in the Appendix, p. xxvi.

non-federal claim, since West Virginia,[26a] like Kentucky, does not permit an unincorporated union to be sued in its state courts in its common name.

Heretofore certiorari was awarded *"because determination of the issue raised here will guide adjustment of a large body of similar claims now pending"* in *Alcoa S. S. Co., Inc.* v. *U. S.*, 338 U. S. 421, 423. More recently, the Court granted certiorari in *Local 761, Int. Union, etc. Workers* v. *NLRB*, 366 U. S. 667, 671, because, *"the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification"*. The *"recurrence of the question"* caused this Court to grant certiorari in *International Brotherhood of Teamsters, Local 695, A.F.L.* v. *Vogt, Inc.*, 354 U. S. 284, 287. Again, in granting the writ in *United States* v. *Standard Oil Co.*, 332 U. S. 301, 302, the Court noted that *"The suit also was said to be representative of a number already commenced"* (p. 302, fn. 2).

II.

To reject UMW's contention asserted in the Sixth Circuit that the evidence did not suffice as a matter of law to sustain a Section 303 violation, in its holding that there was proof of secondary boycott (A. iv), the Sixth Circuit failed to distinguish between permissive primary picketing and proscribed secondary activity and to apply criteria enunciated in this Court's *Local No. 1976, United Bro. of Carpenters* v. *NLRB*, 357 U. S. 93, and *Local 761, International Union of Electrical etc. Workers* v. *NLRB*, 366 U. S. 667, which results in the Sixth Circuit's judgments and decisions being in conflict with the principles established in those cases.

[26a] *Milam* v. *Settle*, 127 W. Va. 271, 32 S. E. 2d 269, holds that an unincorporated labor union cannot be sued as an entity by its name, nor can a judgment be rendered against it merely by name.

Further, since the Sixth Circuit emphasized that the "general objective of defendant was to require Flame to sign the union's contract" and that "Co-Dee and Amanda were separate entities from Flame, as were the individual truckers and trucking companies" (A. iv), the employment of the "independent contractor" test conflicts with the rejection of that standard by the District of Columbia Circuit and the Fifth Circuit in *Local 24, International Bro. of Teamsters* v. *NLRB*, D.C. Cir., 266 F. 2d 675, and *Truck Drivers, etc.* v. *Empire State Express, Inc.*, 5 Cir., 293 F. 2d 414, cert. den. 368 U. S. 931.[20b]

Prior to the Act's adoption, Senator Taft declared the secondary boycott provision "makes it unlawful to resort to a secondary boycott to injure the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees" (93 Cong. Rec. 4323), and that "*It is not intended to apply . . . where the third person is, in effect, in cahoots with or acting as a part of the primary employer*" (95 Cong. Rec. 8709, cited in *Truck Drivers, supra*).[21] Clearly, as between Flame, on the one hand, and Co-Dee and Amanda, on the other, each had a dispute with the union for it sought a contract from each. *Hence, each was a primary employer.* Further, Co-Dee and Amanda could not be regarded as "neutral" and "wholly unconcerned" employers in the disagreement even between Flame and the union. In *Truck Drivers*, the Fifth Circuit rejected a secondary boycott charge because of the overlapping of management functions between multiple companies, declaring

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[20b] The Kentucky Court of Appeals refused to regard picketing as unlawful secondary picketing where each of two companies was a separate entity and each was under separate management because, as the Court held, both companies have an economic interdependence. *General Drivers, etc. Local Union No. 89* v. *American Tobacco Co., Inc.*, 258 S. W. 2d 903 (Ky., 1953).

[21] References to 93 and 95 Congressional Record appear in *Truck Drivers, etc.* v. *Empire State Express, Inc.*, 5 Cir., 293 F. 2d 414, 422.

that the alleged neutral employer was not the unconcerned, neutral employer whom Section 303 was designed to protect (293 F. 2d 423); and herein the Sixth Circuit conceded Virginia C. Collins controlled all three Companies (A. i).

Although the testimony showed that truckers hauling coal to Flame from Co-Dee and Amanda were paid on a tonnage basis, the undisputed evidence was that the union sought to obtain bargaining contracts from them also; *and therefore each truck owner was a primary employer.* Moreover, as between Companies and the truckers, far more than the ordinary arms-length relationship existed. Though Mrs. Collins asserted truck drivers were not under her control (R. 75a), obvious and elemental economic circumstances and necessity placed each under the practical control of Mrs. Collins, as the person in control of the three operations. Certainly the truckers were not persons "wholly unconcerned" in the dispute between Companies and those seeking to have her recognize UMW as a bargaining representative. A complete interdependence and intergration of operations existed between Companies and the truckers. If Companies did not mine coal, the truckers did not haul it; and Flame was without coal to process. Truckers' function consisted purely of driving back and forth from Companies' mines to Flame's tipple. The truckers thus were as much an integral and vital part of the operations on a day-to-day basis as was any employee on Companies' payroll.

But even if the truckers could be considered as neutral employers, and their employees those of neutral employers—which UMW denies—still, this Court has declared that controlling considerations to a secondary boycott finding requires there be "a separate gate marked and set apart from other gates", for secondary employees, and "The key to the problem is found in the type of work

that is being performed by those who use the separate gate", stated this Court in *Local 761*, approving the Second Circuit's yardstick in *United Steelworkers* v. *NLRB*, 2 Cir., 289 F. 2d 591, 595:

> ". . . the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations" (366 U. S. 680, 681).

Since the rendition of *Local 761*, the District of Columbia Circuit has declared, consonant therewith, "a separate gate is a controlling consideration" and it refused to enforce a National Labor Relations Board's secondary boycott order, "Since there was no separate gate". *Teamsters, etc. Local 901* v. *NLRB*, D. C. Cir., 293 F. 2d 881. Similarly, in *Local Union No. 5895, United Steelworkers of America (Carrier Corporation)*, 132 NLRB No. 17, 48 LRRM 1319, where a union struck after a breakdown in negotiations and established picket lines at plant entrances and at an adjacent gate on a railroad right-of-way, pickets attempted to block the train's passage by massing before the gate and blocking the right-of-way with an automobile, and threats were hurled at the train's operating personnel, the Board rejected the contention this conduct was violative of the Act's secondary boycott section (one member dissenting), following this Court's reasoning in *Local 761*.

Though in *UMWA* v. *Osborne Mining Co., Inc.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U. S. 881, cited by the Sixth Circuit to support its secondary boycott conclusion (A. iv), it employed "the independent contractor relationship" (279 F. 2d 724), this antedated this Court's *Local 761*, in which it clarified the standard of conduct essential to bring activities within conduct which Section

303 prohibits, and made clear that *Osborne's* test is not a proper one by which to determine whether Section 303 has been violated. Even if truckers were secondary employees—which UMW denies—, in *Local 761* this Court declared that where the entrance is used, as it was here, by the alleged secondary employees and primary employees alike, "the use of the gate would have been a mingled one outside the bar of § 8(b)(4)(A)" and that "such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees" (366 U. S. 682). This Court's holding in *Local 761*, though directed to the Sixth Circuit's attention, was wholly ignored by it, the Sixth Circuit's opinion making no reference thereto.

A further gross fallacy in the Sixth Circuit's opinion is its declaration that (A. iv):

> "This union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the organization of all involved, whether producers, transporters or processors of coal."

Just as the Sixth Circuit predicated UMW's responsibility upon activities it found had occurred at mines, properties and places which had no relationship to Companies' operations, it employed the same pattern in holding UMW guilty of the secondary boycott, despite the fact that the Sixth Circuit recognized that Companies were among 176 coal companies which had not signed the UMW contract (A. ii), and the undisputed evidence showed that in each of the events at premises away from Companies' property, picketing activity sought to have employers execute a collective bargaining agreement, and there is no evidence whatever that such other employers did business in any wise with Companies, and hence, *the object thereof could not have been to cause*

them to cease doing business with Companies, or either of them. The Sixth Circuit's opinion is challenged by this Court's enunciation in *Local 1976*, that to sustain a violation of Section 303, "Employees must be induced; they must be induced to engage in a strike or concerted refusal; *an object must be to force or require their employer or other person to cease doing business with a third person*" (357 U. S. 93, 98).

There is thus presented the question of whether a labor union in an organizing campaign may be said to be concerned with a *neutral*-employer situation when it seeks to organize a multiple number of *primary employers* and there is a total lack of evidence that the several primary employers are in any way doing business with each other.

In addition to the foregoing errors of law committed by the Sixth Circuit, the other evidence relating to the charge of secondary boycott, detailed herein (*ante*, p. 14 *et seq.*), demonstrates that as a matter of law, the evidence was insufficient to warrant a finding and conclusion that there had been a Section 303 violation. At Flame's operations, a single employee attributed to *an unidentified man* the statement "he would like for us to cut the trucks off until we signed the contract" and to tell the drivers not to go back for more coal (R. 207-8a). Certainly this is not coercion or inducement within Section 303's contemplation. "The objectives of any picketing include a desire to influence others from withholding from the employer their services" but "*hopes* to achieve a forbidden objective" do not run afoul of Section 303. *Local 761*, p. 673.

A single truck driver employee, five truck owners and one equipment man testified concerning shooting at Flame's tipple. But the immateriality thereof, so far as a Section 303 violation is concerned, is, *first*, that violence

on the picket line is not material" and "would not in itself bring the complained-of conduct into conflict with § 8(b)(4)" (*NLRB* v. *International Rice Milling Co.*, 341 U. S. 665, 672); *second*, since *only one employee driver* experienced difficulties, *International Rice Milling Co., supra*, p. 671, negates this as a Section 303 violation; *third*, the experiences related by truck owners at the Flame tipple would not be in violation of the secondary boycott provisions, since conduct banned in Section 303 relates to inducement or encouragement of *employees* of neutral employers, and *not the employers* themselves [*Local 1976* declared, "*Employees* must be induced" (357 U. S. 93, 98); see also *Rabouin dba Conway's Express* v. *NLRB*, 2 Cir., 195 F. 2d 906, 911]; and *fourth*, the incidents relating to the L & N train crew do not fall within the scope of Section 303 because they concern railroad employees excluded by the Act's definitions of "employer" and "employee" [29 USCA 152(2) and (3)],[21a] as the following discussion shows.

UMW's position finds authoritative support in a National Labor Relations Board decision [*Great Northern Railway Co.*, 122 NLRB 1403, 1413-20 (1959)], although the Fifth and Ninth Circuits have reached conclusions at variance therewith (*W. T. Smith Lumber Co.* v. *NLRB*, 5 Cir., 246 F. 2d 129; *Superior Derrick Corp.* v. *NLRB*, 5 Cir., 273 F. 2d 891; *Great Northern Railway Co.* v. *NLRB*, 9 Cir., 272 F. 2d 741). That the Board's view is correct is shown by the fact that the Act, as amended in 1959, changed the phrase "employees of any employer" to read "any individual employed by any person".[21b] Had railroads and their employees been included within the terms "employers" and "employees", as the Fifth and

[21a] These statutory definitions appear in the Appendix, p. xvi.

[21b] Section 8(b)(4)(i) of the amended Act appears in the Appendix, p. xvi.

Ninth Circuits held, there would have been no necessity for Congress to change the language, as it did, in its 1959 amendment.

The amendment's legislative history militates against the Courts of Appeals' conclusion and shows that Senate Report No. 187 on S. 1555 pointed to the fact that under the Act's definitions, "railroad employees . . . are not employees within the meaning of the act" and declared that use of the words "any person", as found in the present statute, would extend the ban to the excluded categories.[21c] Likewise, statements of Senators Curtis[21d] and McClellan[21e] and Representative Griffin[21f] during the amended Act's debates sustain UMW's contention.

Further militating against any contention that the evidence concerning the L & N train crew proves a violation of Section 303, other positive and undisputed evidence shows that the L & N train crew traditionally refused to cross any picket line (*ante*, p. 16). In *Local 1976*, the Supreme Court made plain a prerequisite to a violation of the Act's secondary boycott provisions was that "an object must be to force or require their employer or another person to cease doing business with a third person" (357 U. S. 98). The Supreme Court reiterated this teaching in *Local 761* (366 U. S. 667), and declared (p. 673-4), *"picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer"*.

[21c] Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (U. S. Government Printing Office), Vol. I, p. 476.

[21d] *Ibid.*, Vol. II, p. 989.

[21e] *Ibid.*, Vol. II, p. 1193.

[21f] *Ibid.*, Vol. II, p. 1522-3. Statements in footnotes 21d-21f appear in the Appendix herein, pp. xxi-xxii.

Furthermore, testimony of witnesses concerning experiences of "supervisor crews" which "consisted of train masters and traveling engineers" did not prove any violation of Section 303, since such individuals would not be "employees" within the Act's meaning. See *Rabouin etc.* v. *NLRB* (*ante*, p. 32).

In the Appendix (pp. xxvi, *et seq.*) appears a list of pending cases in district courts within both the Sixth and Fourth Circuits which are concerned with the question of conduct necessary to come within the proscriptions of the federal statute. That the pendency of such cases warrants issuance of the writ herein has already been shown (*ante*, p. 25-6) and the citations of *Alcoa, Local 761, Teamsters, Local 695*, and *Standard Oil Co.* are equally apposite to the instant question. The employment by the Sixth Circuit of criteria which are at variance with those already enunciated by this Court and the conflict of principles expressed between the Sixth Circuit and the District of Columbia and Fifth Circuits and those of the National Labor Relations Board[21] warrant, UMW submits, a review of the instant case.

III.

In its sanction of the jury's award of $50,000.00 punitive damages, the Sixth Circuit did not expressly delineate whether the allowance was based upon activity in violation of Section 303 or the common-law claim. If the award was concomitant to the Sixth Circuit's conclusion there was secondary boycott proof, then the punitive damage award is in total conflict with the Fourth Circuit's holding in *UMWA* v. *Patton*, 4 Cir., 211 F. 2d

[21] Though the Board's concern has been with unfair labor practices under Section 8(b)(4), as was *Local 761*, that section is the counterpart of Section 303. *Int. Bro. of Electrical Workers* v. *NLRB*, 341 U. S. 694.

742, cert. den. 348 U. S. 824, which held squarely that Congress had not in Section 303 vested in the courts the power to punish unions by awards of punitive damages.[22]

That the conclusion reached by the Fourth Circuit is correct and that reached by the Sixth Circuit erroneous is clear from the following discussion.

The district court, the record shows (R. 69a), noted that, "nothing in the statute [Section 303] indicates that punitive damages should not be awarded, especially when a violation of the Act is coupled with a common law tort for which punitive damages can be awarded"; but what the district court and the Sixth Circuit have achieved herein is precisely what proponents of Section 303 assured Congress would not occur. In the Section 303 debates, Senator Taft verbalized his assurances that Section 303's plenary purpose was "only to restore to people, who lose something, *because of boycotts* and jurisdictional strikes, *the money which they have lost*"; "we simply provide for the amount of the actual damages"; "The Senate Bill is not a punitive bill"; and "The Committee did not approach the subject with the idea of recommending or passing a *punitive* measure."[23] Four Senators (Taft, Ball, Donnell and Jenner) who proposed Section 303 affirmatively noted they saw no reason why the amendment "should be regarded as punitive."[24] So determined was Congress that a Section 303 plaintiff was to be limited to actual damages it refused to adopt the House version that a "reasonable attorneys' fee" be in-

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[22]The portion of the Fourth Circuit's *Patton* which deals with the issue of punitive damages appears in the Appendix hereto, pp. xxiii, *et seq.*

[23]Legislative History of the Labor Management Relations Act, 1947, pp. 1371, 1398, 1520 of Vol. 2.

[24]*Ibid.*, Vol. 1, pp. 460-2, Senate Report No. 105 on S. 1126, Supplemental Views.

cluded in the costs of the suit.[25] As the Fourth Circuit's *Patton* states: "Where Congress has intended that damages in excess of the actual damage sustained by plaintiff may be recovered in an action created by statute, it has found no difficulty in using language appropriate to that end", noting that "in copyright cases (17 USC 1), in patent cases (35 USC 67), and in antitrust cases (15 USC 15), the right to recover treble damages is expressly given" (A. xxiv).[26]

The foregoing discussion has been premised upon the punitive damage award stemming from a violation of Section 303. If, on the other hand, the award was bottomed upon a violation of the Kentucky common law, then the judgment entered upon the jury's award would be beyond the jurisdiction, power and authority of the district court under the doctrine of federal preemption, and therefore wholly void.

Since Congress, in enacting Section 303, forbade a punitive damage award for conduct which violated that legislation, and Companies asserted that pendent jurisdiction of the non-federal, common-law action was warranted because, in *Hurn's* language (289 U. S. 246), both federal and non-federal claims "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances", under the doctrine of federal preemption

[25] See Appendix, p. xx, for Section 12(b) of H. R. 3020, 80th Congress, First Session.

[26] UMW requested, and the district court denied, Instruction XIII which would have told the jury punitive damages were not recoverable under Section 303. Nor was the substance of the Instruction covered in the jury charge. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 8 L. ed 2d 305 (May 28, 1962), reversal was ordered because of an error in the court's charge. Though UMW contended in the Sixth Circuit it was error to refuse Instruction XIII, this was one of the questions raised which the Sixth Circuit declared it did not consider required discussion. (A. iii).

the punitive damage award approved by the Sixth Circuit herein clearly thwarts Congress' intention and purpose in enacting Section 303. In that section Congress expressed a portion of national labor policy, the pertinency of which this Court has recognized on at least four occasions since the enactment of that legislation. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448; *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459; *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 578; *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95. The Sixth Circuit's attempted judicial amendment thereof through the device of pendent jurisdiction is challenged by the well-established principle that "When Congress has taken the particular subject matter in hand . . . a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go". *Charleston & W. C. R. R.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604. As already noted (*ante*, p. 24), the holding in *Sherlock* v. *Alling*, 93 U. S. 99, 104, is that "Whatever . . . Congress determines . . . as to . . . *the liability for its infringement is exclusive of state authority*". The Sixth Circuit's imprimatur of the punitive damage portion of the judgments herein complained of is wholly inconsonant with the rule expressed in *Sherlock* v. *Alling*, as well as *Pennsylvania R. R. Co.* v. *Public Service Commission* and *Sola Electric Co.* v. *Jefferson Electric Co.*, *ante*, p. 24. It also collides with this Court's *Garner* v. *Teamsters, etc. Local Union No. 776*, 346 U. S. 485, 498-9, wherein the Supreme Court recognized that where there is a conflict of remedies and the state remedy differs from that provided for by the federal statute, the state remedy must be subordinated to that which Congress has provided.

More recently, in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 242, this Court declared that

it has "necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes". "Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purposes." (359 U. S. 244).

If the district court and the Sixth Circuit correctly concluded that pendent jurisdiction was warranted under *Hurn*, then Section 303 affords Companies a remedy—and the sole remedy—by which to obtain a money damage award for its violation and that remedy rejects the inclusion of punitive damages.

In *Patton*, the Fourth Circuit not only rejected a contention that in a Section 303 cause of action punitive damages could be allowed; it also rejected the further contention that punitive damages could be awarded for the common-law tort of interference, declaring (A. xxiv):

> "This is not a case brought under the diversity jurisdiction of the federal court to enforce a common-law liability . . . *and the plaintiffs are entitled to invoke the jurisdiction of the federal courts only because they sue on a cause of action created by a federal statute, i. e., on the cause of action created by Section 303(b) of the Labor Management Relations Act . . .*"[2]

[2] In the *Patton* case, plaintiffs asserted, in their *Patton* brief in the Fourth Circuit (p. 34) that "The evidence is such to establish not only secondary boycott as made unlawful by the Taft-Hartley law but also the common law tort of interference with the contract right . . . In such a case where the federal question, to-wit, the secondary boycott under the Taft-Hartley Act, is not plainly wanting in substance, the federal court, . . . may nevertheless retain and dispose of the case upon the non-federal ground", citing the *Hurn* case. This contention appears too in *United Mine Workers of America* v. *Patton*, *supra*, as reported in 47 ALR 2d 850, 855.

Thus, whether liability is grounded in a Section 303 violation or in the common law of Kentucky, the punitive damages award is offensive to national labor policy and this Court's decisional law. Though, in the Sixth Circuit, UMW presented both the proposition that the federal act would not permit punitive damage awards and that of federal preemption, that court, in its opinion, responded to neither. The pattern employed by the Sixth Circuit herein will continue as a precedent in the frustration of Congressional policy unless, by review, this Court resolves both the conflict in the results reached by the Sixth Circuit herein and by the Fourth Circuit in *Patton*.

Excluding the instant case, there are currently pending in federal courts 24 cases, in each of which there is an involvement of the question of punitive damages.[27a] The "recurrence of the question" occasioned this Court's allowance of certiorari in *Alcoa, Local 761*, and *Teamsters Local 695* (*ante*, p. 26). Similarly, where this Court noted that "The suit also was said to be representative of a number already commenced", certiorari was granted in *U. S.* v. *Standard Oil Co.*, 332 U. S. 301, 302.

IV.

In the Sixth Circuit, UMW complained that the district court had failed and refused to give to the jury the ele-

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[27a] Pending cases include:

Name of Company	Damages Claimed Compensatory	Punitive
Clyde Meeks	$ 12,500.00	$ 12,500.00
Paul Gibbs	250,000.00	100,000.00
White Oak Coal Corporation, Inc. and Arnold Coal Company	185,000.00	125,000.00
Lyle Coal Co.	100,000.00	50,000.00
Allen Trucking Co., et al	420,000.00	200,000.00
Double Camp Mining Co.	950,000.00	500,000.00
Parton Coal Co.	400,000.00	150,000.00
Mitchell Coal Co., Inc.	150,000.00	150,000.00
Elkhorn Coal Co.	150,000.00	100,000.00
East Kentucky Collieries, Inc.	75,000.00	150,000.00

(Footnote No. 27a Continued on Page 40)

ments essential to its finding that UMW had violated Section 303. These would have been presented by the court's giving UMW's Instruction IV.[28] Though purporting to define a secondary boycott,[29] the district court

(Footnote No. 27a Continued from Page 39)

A & A Coal Co.	213,000.00	75,000.00
Scuddy Coal Co.	605,000.00	605,000.00
C & P Coal Co.	1,120,000.00	300,000.00
Kinty Trucking Co.	115,000.00	40,000.00
Kittle Trucking Co.	53,500.00	25,000.00
Sinsel Coal Co.	240,000.00	75,000.00
Dorothy Coal Co., et al	245,100.00	100,000.00
Green Valley Mining Co., Inc.	322,500.00	100,000.00
Blue Ridge Coal Co., Inc.	161,300.00	60,000.00
Layman Coal Co.	61,000.00	10,000.00
Marra Brothers Coal Co.	210,000.00	50,000.00
Thompson Coal & Construction Co.	120,000.00	50,000.00
M & T Coal Co.	93,500.00	50,000.00
P & J Coal Co.	125,800.00	40,000.00
Total	$ 6,378,200.00	$ 3,117,500.00

A detailed description of the foregoing cases is to be found in Appendix E hereto (A. xxvi), which also includes *Sunfire Coal Co. et al* v. *UMWA* now pending in the Sixth Circuit which does not include an award of punitive damages, as well as *Days Branch Darby Coal Co.* v. *UMWA* and *Blair-Elkhorn Mining Co.* v. *UMWA* which do not include a claim for punitive damages. These are 24 cases of the 27 cases listed in Appendix E.

[28]Defendant's Requested Instruction No. IV read as follows (R. 466a):

> "In the instant case, plaintiffs alleged that the instant action is brought under Section 303 of the Labor Management Relations Act, 1947, which makes it unlawful for a labor union to engage in, induce or encourage the employees of any employer to strike with the object of forcing that employer either to cease doing business with any other person or to force such other employer to recognize a labor union as representative of its employees when that union has not been certified as plaintiffs' employees' representative.
>
> "Before plaintiffs can recover in this case, the coal companies must show by clear proof that the United Mine Workers of America, acting by and through its agents acting within the scope of their authority not only engaged in a strike, or induced or encouraged the employees of each of the coal companies to strike and cease producing or handling coal for the plaintiff coal companies or some other employer but they must also prove by a preponderance of the evidence that the object of the union was either to force plaintiffs to cease doing business with another person or to force plaintiffs and other employers to recognize the Union as representative of their employees. Unless you believe from a preponderance of the evidence, the strike and picketing in this case had such objective, then you will find for the United Mine Workers of America."

[29]See discussion, *ante*, p. 11.

omitted from the charge the essential element of the strike and picketing's *object*. At no place in the jury charge does the trial court concern itself with the Supreme Court's enunciation in *Local 1976, United Bro. of Carpenters* v. *NLRB*, 357 U. S. 93, 98, that "an *object* must be to force or require their employer or another person to cease doing business with a third person." That this was a critical omission is clear from recent expressions of this Court that, in construing whether activities interdicted in Section 303 have occurred, consideration must be given to the right of primary picketing (*Local 761*, 366 U. S. 672); and this is emphasized by the Act's Section 13 (29 USCA 163) [A. xviii], declaring national labor policy to be that except as Congress diminished the right to strike in the Act, nothing therein should be construed to diminish that right in any way. In *Local 761*, this Court gave particular stress to the need for judicially distinguishing between objects of picketing which fall within Section 303's ban and those which do not. That is precisely what the district court failed to do.

In the Sixth Circuit, attention was directed to this Court's having highlighted in *Local 761* the difficulty which federal courts and the National Labor Relations Board had experienced in interpreting the federal section, despite their expertise. UMW argued there was no reason to think a jury of laymen would be less perplexed as to what is required to sustain a Section 303 violation, and this pressed upon the trial court the positive necessity that a jury be given, with utmost clarity and precision, the guidelines for its determinations. Where Companies had added, as here, a common law violation to the complexities attending Section 303, it became critical and vital that the trial court should acquaint the jury with any distinctions involved, if the jury verdict was to have meaning and validity. UMW's position is

consonant with this Court's profession in *Local 761* (366 U. S. 673) that the distinction between legitimate "primary" and banned "secondary" activity *"does not present a glaringly bright line"*.

Though the Sixth Circuit had in a previous case mandated that a trial court's duty was to charge the jury correctly on material issues (*Bellak* v. *United Home Life Ins. Co.*, 6 Cir., 244 F. 2d 623), in the case at bar it ignored UMW complaint that so vital an element as the *object* of the picketing activity, had been withheld from the jury and did not deem it requisite to answer UMW's question whether the trial court had committed reversible error in refusing to charge the jury on the elements essential to a Section 303 violation and in failing to include in its charge such elements.

This results in district courts within the Sixth Circuit's jurisdiction not having the benefit of judicial guide in the trial of cases arising under Section 303, and particularly in the event that there is a joinder of a complaint under Section 303 with that of a non-federal claim.

Where, as here, the jury has rendered a general verdict and it is not possible to tell whether it believed a violation existed as to the federal statute (Section 303) or the Kentucky common-law claim, as pointed out in *Sunkist* (8 L. ed 2d 305, 312):

> "As was stated of a general verdict in Maryland use of *Markley* v. *Baldwin*, 112 US 490, 493, 28 L ed 822, 823, 5 S Ct 278 (1884), '[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, *or in the charge of the court*, the verdict cannot be upheld . . . .'"

Moreover, since, as shown (*ante*, p. 25, 34, 39), similar cases which may well involve the problem now discussed

are now pending not only within the Sixth Circuit's district courts, but also in one of the Fourth Circuit, resolution of this question which is important in the implementation of the federal statute involved can be effected only by this Court's determination thereof.

CONCLUSION

For the foregoing reasons, Petitioner prays that this petition for writ of certiorari should be granted, and that a writ of certiorari issue to review the decision and judgments of the United States Court of Appeals for the Sixth Circuit, rendered and entered in said Case No. 14,498 on May 21, 1962 and June 15, 1962, as aforesaid.

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August, 1962.

APPENDIX A

No. 14498

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FLAME COAL COMPANY, et al., *Plaintiffs-Appellees*, v. UNITED MINE WORKERS OF AMERICA, *Defendant-Appellant*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided May 21, 1962.

Before MILLER, Chief Judge, CECIL and O'SULLIVAN, Circuit Judges.

O'SULLIVAN, Circuit Judge. This is an appeal from plaintiffs' judgment in an action against United Mine Workers of America for damages under Section 303 of the Labor Management Relations Act of 1947, (29 U. S. C. A. 187) for secondary boycott and for the common law tort of wrongful interference with business. Upon a jury's verdict, judgment was entered for plaintiffs in the amount of $104,845.00, of which $54,845.00 was for compensatory and $50,000.00 for punitive damages.

Plaintiffs, Flame Coal Company, Co-Dee Coal Company and Amanda Coal Company, are Kentucky Corporations, referred to herein as Flame, Co-Dee and Amanda. At the time of the alleged wrongs, Co-Dee and Amanda were engaged in the auger mining of coal in Eastern Kentucky. The coal mined by them was sold to Flame, and transported by independent truckers to the premises of Flame where it was processed and loaded into railroad cars for shipment to Flame's customers. Flame, Co-Dee and Amanda are controlled by one person, Mrs. Virginia C. Collins, who is the principal stockholder of each, but each had one or more stockholders not common to the others.

Plaintiffs were among one hundred and seventy-six (176) coal companies in the southeastern Kentucky-northeastern Tennessee region which had not signed the National Bituminous Coal Wage Agreement of 1950, as amended in 1958. In the spring of 1959, starting about March 17, the defendant, United Mine Workers of America, carried on a campaign to obtain agreements with unsigned companies, including plaintiff Flame. The campaign was conceived and prosecuted on a grand scale. Spectacular and varied methods were employed. Mass picketing at the tipple sites, on the highways, on railroad sidings, and at the mines was carried on. Pickets, sometimes numbering in excess of a thousand men, roamed throughout the area in motor convoys. The persuasion of sheer numbers was supplemented by more violent and forceful methods. Trucks were stopped at tipples, and on the way to and from them; their loads were dumped on, and off of, the highway. Mine and tipple workers were beaten. Strong threats of violence were made to the independent truck drivers to persuade them to discontinue transporting coal from the mines to the tipples. After April 30, 1959, when mass picketing was substantially discontinued because of a federal court injunction (there was evidence by defendant that the picketing convoys were stopped because troublesome strangers were joining them) the pattern of coercion took a different and still more violent turn. Railroad tracks and bridges were dynamited, as were tipples, trucks and other equipment. In fulfillment of a prophetic warning to truckers and others that "when the leaves came out on the trees" more convincing methods would be employed, the Flame tipple was put under gunfire from the nearby hills almost daily. There was evidence that guards at the tipple, on some occasions, returned the fire.

The web of persuasion extended over a wide area. Mass picketing at the Flame tipple prevented the processing of coal there. Mass picketing at a railroad switching point prevented the removal of coal from the tipple. Trucks and automobiles were struck by bullets and that, with other threats, violence and interference, persuaded truckers to give up hauling coal from the Co-Dee and Amanda mines to the Flame tipple. On eight different occasions, the railroad spur track leading to the tipple was dynamited.

Field representatives of defendant United Mine Workers directed and led the convoys of pickets and were present at or near the scene of much of the described violence. These field men were selected and appointed by the President of District 30 of the defendant United Mine Workers. The events here involved occurred within District 30. Specific identification of the riflemen in the hills, the dynamiters, and other individuals, perpetrators of violence and threats, was not made. Defendant's witnesses testified of instructions given to the members of the convoys to behave themselves and not violate the law. Our review of the record, however, satisfies us that there was admissible and competent evidence from which the jury could infer and find that defendant union was the author of, and responsible for, the violence and illegal conduct which effectively interrupted and interfered with the business of plaintiffs. The evidence was sufficient to support a verdict and judgment requiring defendant union to respond in damages for the acts of its members, agents and representatives. *United Mine Workers of America* v. *Patton*, 211 F. (2) 742 (C. A. 4, 1954); *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F. (2) 52, 61 (C. A. 6, 1959) cert. denied 359 U. S. 1013.

Defendant's motions for directed verdict, for judgment notwithstanding the verdict, and for a new trial were denied. On this appeal, it presents some fourteen statements of questions involved. We discuss such of them as we consider require it, as follows:

(1) *Jurisdiction.* Defendant denies the jurisdiction of the district court to entertain a case where a claim under Section 303 of the Labor Management Relations Act of 1947 (29 U. S. C. A. 187) is joined with a non-federal common law action for tort.

This contention has been considered and disposed of, contrary to defendant's contention, in the cases of *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F. (2) 52 (C. A. 6, 1959), cert. denied 359 U. S. 1013; *United Mine Workers of America* v. *Osborne Mining Company*, 279 F. (2) 716 (C. A. 6, 1960) cert. denied 364 U. S. 881; *Gilchrist* v. *United Mine Workers of America*, 290 F. (2) 36 (C. A. 6, 1961), cert. denied 368 U. S. 875. In *Meadow Creek*, Judge Martin of this

court quoted the district court's conclusion that, "the claim of secondary boycott and unlawful conspiracy are not separate causes of action, but are merely different grounds to support a single cause of action, the cause being the violation of plaintiff's right to be free from wrongful interference with its business." Citing *Hurn* v. *Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148, he sustained the district court's retention of jurisdiction to dispose of the entire cause of action.

A different phase of defendant's attack upon the district court's jurisdiction is its argument that defendant, a voluntary unincorporated association, is not considered, in Kentucky, a jural entity subject to suit, and there being no diversity of citizenship between plaintiff and the officers and members of the union, jurisdiction in the federal court could not attach as to the common law action. However, federal jurisdiction attached here because of the secondary boycott and under Rule 17(b) F. R. Civ. P. defendant, an unincorporated association, is suable as such and in the federal court may be made to respond in damages for its tortious conduct (29 U. S. C. A. 187). *Gilchrist* v. *United Mine Workers of America*, supra (290 F. [2] 39); *United Mine Workers of America* v. *Osborne*, supra (279 F. [2] 716).

(2) *Was there proof of a secondary boycott?* Appellant argues that there was no evidence that the United Mine Workers encouraged employees of other employers to cease handling coal of the plaintiffs for a prohibited objective within the meaning of Section 303. Argument is made that defendant did not induce a concert of action by employees of any neutral employer; that the case did not present a situation involving *primary* and *secondary* employers. It is sufficient to say that the general objective of defendant was to require Flame to sign the union's contract: Co-Dee and Amanda were separate entities from Flame, as were the individual truckers and trucking companies. This union cannot escape the charge of secondary boycott because it chose to attack on all fronts at once, claiming its desire and objective to be the organization of all involved, whether producers, transporters or processors of coal. *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. (2) 716, 723.

(3) *Admission of evidence of events occurring at other mines.* The district court admitted evidence of violence occurring at the premises of operators other than plaintiffs. Such evidence disclosed the broad pattern of defendant's campaign, with violence sufficiently spectacular and in such proximity to plaintiffs' operation as to become known to secondary employers and their employees and to induce them to discontinue mining or hauling coal for Flame. By Judge Weick's opinion in *Osborne* (p. 725) we held such evidence admissible.

(4) *Punitive damages.* The defendant claims that punitive damages were not recoverable. Under facts so similar to what the evidence here disclosed as to provide appropriate precedent, we held that it was permissible to allow punitive damages. *United Mine Workers of America* v. *Osborne Mining Company*, supra; *Gilchrist* v. *United Mine Workers*, supra. We need not here add to what was said in those cases.

(5) *Compensatory damages.* Aside from Flame's cost of repairing dynamited railroad tracks and wages paid to extra guards employed to guard its tipple, plaintiffs' evidence of compensatory damages consisted of an estimate of profits that they claim were lost by Flame, Amanda and Co-Dee as a direct result of tortious conduct of the United Mine Workers. Defendant charges that the evidence of loss of profits was too speculative and conjectural to permit a jury to award damages therefor. Defendant further asserts that there was not sufficient evidence of previous profitable operations by plaintiffs in the locality where the tort was committed to justify the award made.

Virginia Collins was the controlling shareholder of the three corporations who were operating in Letcher County at the time of the events described in the evidence. Co-Dee was organized in 1954 and carried on the mining and selling of coal in counties neighboring on Letcher County. It had an operating loss at the end of its fiscal year ending on July 1, 1955. In the next year it earned net income of $17,355.65, which was offset by a 1954 carry over loss. For the tax year ending July 31, 1957, it earned taxable income of $32,077.23. The tax returns for the next two years were not produced (claimed to have been lost) but Virginia Collins testified from memory

that Co-Dee earned from eight to nine thousand dollars during such period. Amanda began its mining operations in counties near to Letcher County in October, 1957. Tax returns for its pre-1959 operations were not produced, but Virginia Collins testified it made a profit and that out of its earnings it had paid for a substantial amount of equipment. Flame was incorporated in September, 1958, and in that fall the three corporations moved their operations to Letcher County. The first deliveries of coal mined by Co-Dee and Amanda were made by Flame on December 30, 1958. In the succeeding months, Flame delivered about 33,000 tons of coal mined and delivered to it by Co-Dee and Amanda. There was evidence that Flame, at the beginning of the defendant's activities herein described, had orders for 267,500 tons of coal to be delivered over the balance of the year. There was testimony that the undelivered portions of these orders were cancelled because of Flame's inability to make required deliveries during the continuance of defendant's charged tortious activities. Miss Collins gave testimony of the price Flame was to pay for the coal delivered to it by Co-Dee and Amanda.

An accountant testifying for plaintiffs worked up a schedule (Exhibit 26) purporting to compute the profits lost by the three companies from the cancellation of Flame's orders. His calculations were based, in part, upon facts in evidence and, in part, upon his examination of books and records of the plaintiff companies. For reasons hereinafter stated in the next division of this opinion, we hold that Exhibit 26 was not the best evidence of all that it purported to show. We hold that, upon proper objection made, plaintiffs should have been required to identify and produce such of its records as were not produced, but which were used by the accountant in constructing Exhibit 26. Using the calculations of his exhibit, the accountant witness projected an estimate of total loss of profits for the three companies at $228,190.63. The computations of the exhibit took into account the price of coal bought and sold by plaintiff companies, with estimates, based on past and current expense, of costs chargeable against expected receipts. We cannot say that, as a matter of law, such evidence (had Exhibit 26 been admissible) was wholly insufficient as a basis for the allowance of damages for lost profits.

In addition to proof of existing orders, plaintiffs produced evidence of leases held by them for coal lands which contained mineable coal in quantities ample to have permitted the filling of Flame's orders. There was evidence that at the beginning of this operation in Letcher County, the three companies had machinery and equipment for use in their operations, the total cost of which was $417,285.12.

We are aware of the general rule that damages for loss of future profits will not be allowed where their ascertainment must depend on speculation and conjecture. 15 Am. Jur. "*Damages*" § 150. If a new trial of this case is had and Exhibit 26 or its content is properly qualified for admission, there would, in our opinion, be sufficient evidence from which an award for compensatory damages for loss of profits could be awarded. The jury could find that plaintiffs suffered damages and that such damages were proximately caused by defendant's tortious misconduct. Uncertainty as to their amount will not foreclose recovery. In *Story Parchment Co. v. Paterson Parchment Paper Company*, 282 U. S. 555, 562-563, 75 L. Ed. 548, the Supreme Court said:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount. . . . Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."

In *United Mine Workers* v. *Osborne*, supra, we said: "Profits are recoverable where there is an established business and they can be proven with reasonable certainty" (p. 727).

A method not unlike the plaintiffs' calculations here was employed to establish damages in *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. (2) 416, 427 (C. A. 10, 1952). The damages sought were for loss of profits from sales that the injured party was deprived of. Holding the evidence sufficient, the court concluded, "They (the injured party) showed that they had the facilities, the personnel and the finances to manufacture and market the Dempsey products." In the case at bar, there was evidence that at the beginning of defendant's campaign of violence, plaintiffs had the facilities, the coal leases, the orders for coal and other necessary means to pursue a profitable operation. There was evidence of previous profitable operation, and while plaintiffs' operations in the county which was the situs of defendant's tort had continued for only a few months, it provided some background for a projection of profits they would have enjoyed but for defendant's misconduct. Defendant attacked plaintiffs' calculations of future profits by cross examination of plaintiffs' witnesses and by opposing evidence which challenged the accuracy and validity of plaintiffs' assertions. It was for the jury to weigh the evidence and to draw such inferences and make such findings as were justified. Plaintiffs' estimate of lost profit was $228,190.63. The jury's award of compensatory damages was $54,845.00.

Kentucky decisions are not in conflict with our conclusion as to the sufficiency of plaintiffs' proofs of compensatory damages. *Eastern Kentucky Lumber & Development Co.* v. *Waddell*, 239 S. W. (2) 68, 71 (Ky. 1951); *Union Cotton Company* v. *Bondurant*, 188 Ky. 319, 323 (1920); *Time Finance Company, Inc.* v. *Beckman*, 295 S. W. (2) 346, 350 (Ky. 1956).

(6) *Admissibility of exhibit prepared from books and records not produced.* Within a few days before commencement of trial, defendant brought on for hearing a motion under Rule 34, F. R. Civ. P., for an order requiring plaintiffs to produce for inspection and copying all of their books and records relating to plaintiffs' operations for the period from 1954 through 1959. The motion was denied, primarily because the

district judge felt that the motion came too late, and would delay the trial. It was within the discretion of the district judge to deny such motion presented at the imminence of trial, and we find no error in such denial. Plaintiffs' counsel, however, at the time of the hearing of the motion offered to allow defendant's counsel to review plaintiffs' records.

Upon trial, plaintiffs produced an accountant who identified Exhibit 26, hereinabove referred to, as his computation of the profits lost by plaintiffs as a result of defendant's conduct. The document was entitled, "Schedule of Lost Profits in Coal Orders" and contained the witness' computation and recitation of all the elements necessary to the exhibit's conclusions. It covered the three plaintiff companies and treated of such items as depreciation, costs of all kinds, the selling and cost price of coal, and the tonnage claimed to have been lost. Its footings asserted profits lost by each company, with a grand total of $228,190.63. To qualify the exhibit, the witness testified, "The figures that I prepared were made from all available records of Amanda Coal Company, Co-Dee Coal Company and Flame Coal Company." Objection to the exhibit was made on the ground that the records from which the exhibit was prepared were the best evidence of their contents, and should be produced and identified to aid defense counsel's cross examination of the witness. The objection was overruled. The records were not produced. We find error in the admission of such exhibit.

This exhibit was important proof to sustain plaintiffs' claims for compensatory damages. The materials from which it was composed and which would support its validity were not produced. We are not impressed that the pretrial offer of plaintiffs' counsel to allow a general inspection of its records was a substitute for having the records available and identified at the trial. Defendant's counsel was entitled to review such records with particular reference to the exhibit offered. The accuracy of the underlying figures and factual assumptions, and the validity of the conclusions of the exhibit, could not be tested until the exhibit itself was seen and disclosure made of what was to be claimed for it. Cross-examination of the witness producing the exhibit was frustrated by the absence of material claimed to support it.

APPENDICES

While there was evidence that some of plaintiffs' records had been lost, there was no showing that the records employed by the accountant could not have been produced. It was plaintiffs' duty to do so if they desired to use the tabulation made therefrom.

Tabulations made by accountants from documentary material may be used, but the admissibility of such documents must first be established and, in the absence of a showing that such material cannot be produced, they should be produced or made available at the time the tabulation is offered. 4 *Wigmore on Evidence*, § 1230, 3d Ed. Such is the rule in Kentucky. *Harlan Coal & Coke Co.* v. *Davidson*, 203 Ky. 580, 583 (1924); *Edelen* v. *Muir*, 163 Ky. 685, 688 (1915); *Bush* v. *Board of Education*, 238 Ky. 297, 311 (1931). The same rule has been applied in the Federal Courts. *Morton Butler Timber Co.* v. *United States*, 91 F. (2) 884, 889 (C. A. 6, 1937); *American Vitrified Products Co.* v. *Wyer*, 221 F. (2) 447, 453 (C. A. 6. 1955); *John Irving Shoe Co., Inc.* v. *Dugan*, 93 F. (2) 711, 713 (C. A. 1, 1937); *Berthold-Jennings Lumber Co.* v. *St. Louis I. M. & S. Ry. Co.*, 80 F. (2) 32, 44 (C. A. 8, 1935).

(7) *Nature of remand.* There was evidence that special damages to plaintiffs totalled $8,225.00; $1,225.00 as the cost of repairing railroad tracks and $7,000.00 for extra watchmen hired during the period of violence. All other compensatory damages claimed related to loss of profits. Without the information provided by Exhibit 26 (Schedule of Loss of Profits), there was not evidentiary foundation for an award of damages for lost profits. Holding that such evidence was inadmissible, we cannot affirm a judgment for compensatory damages in excess of the $8,225.00 special damages. We are of the opinion, however, that such holding does not require the unconditional granting of a new trial. Plaintiffs' proofs made out a strong case of liability, and justified an award of substantial punitive damages. We consider, therefore, whether it would be proper to affirm the judgment of the District Court if plaintiffs remit all compensatory damages in excess of the proven special damages. We have the authority to do so. *Hansen* v. *Boyd*, 161 U. S. 397, 411-412; *Louisiana Power &Light Co.* v. *Sutherland Specialty Co.*, 194 F. (2) 536, 587 (C. A. 5, 1952); *O'Connor* v. *United States*, 269 F. (2) 578, 585-586 (C. A. 2, 1959).

Many courts have passed upon the necessity of an award of actual (compensatory) damages to support punitive damages and whether it is necessary that there be a proportional relationship between them. Some of their decisions are gathered in Annotations in 17 A. L. R. (2) 527, and 33 A. L. R. 384. It is the general rule that punitive damages "must bear some relation to the injury inflicted and the cause thereof," 15 Am. Jur. "*Damages*" § 295. The above annotations, however, disclose a conflict in the decisions as to whether an award of punitive damages must be reasonably proportionate to the amount awarded for actual damages. Kentucky, whose law we follow on the question of punitive damages, has clearly announced its rule that an award of punitive damages need not bear a proportional relationship to the award of actual damages. *Maddix* v. *Gammon*, 293 Ky. 540, 543, 544; *L. & N. R.R. Co.* v. *Ritchel*, 148 Ky. 701; *Engleman* v. *Caldwell & Jones*, 243 Ky. 23; *Wigginton's Admr.* v. *Rickert*, 186 Ky. 650; *Harrod* v. *Fraley* (Ky.), 289 S. W. (2) 203; *Henderson* v. *Henderson Funeral Home Corp.* (Ky.), 320 S. W. (2) 113.

Kentucky follows the general rule that punitive damages must bear some relationship to the injury and the cause thereof. *L. & N. R.R. Co.* v. *Ritchel*, supra, p. 706; *Louisville Southern Railroad Co.* v. *Minogue*, 90 Ky. 369; *L. & N. R.R. Co.* v. *Roth*, 130 Ky. 759, 768; *Buford* v. *Hopewell, et al.*, 140 Ky. 806. That is not to say, however, that a verdict for punitive damages must be proportionate to the amount of the award for actual damages.

In the case before us, excluding plaintiffs' Exhibit 26 (Schedule of Loss of Profits), there was evidence of serious injury to plaintiffs and much evidence of wilful and malicious conduct. Appellants do not charge that the award of $50,000 punitive damages was excessive. We are not persuaded that, had the District Judge sustained the objection to Exhibit 26 and eliminated loss of profits from the jury's consideration, an award of $50,000 for punitive damages would have been unwarranted. We do not think, either, that we need to speculate whether the jury's award of punitive damages would have been in a smaller amount had it been restricted to an award of $8,225.00 for actual damages. A disparity between actual and punitive damages equal to the proportionate difference between $8,225.00 and $50,000.00 has been sustained by the

Kentucky Court of Appeals, *L. & N. R.R. Co.* v. *Ritchel*, supra; *Maddix* v. *Gammon*, supra.

While we find no precise precedent for ordering a remission of a portion of the actual damages while sustaining an award of punitive damages, the case of *Devine* v. *Patteson*, 242 F. (2) 828 (C. A. 6, 1957), supports our view that a remand as to actual damages does not require a retrial as to punitive damages. There, this Court was considering the claim that a jury verdict for $500.00 actual damages and $1.00 punitive damages was inadequate. The judgment as to compensatory damages for $500.00 was set aside as inadequate, and a new trial as to that issue only was ordered. The award as to punitive damages was not disturbed, Judge Allen saying, "As to punitive damages, the award is peculiarly within the discretion of the jury. We cannot say that the discretion was abused and we do not set aside the verdict of $1.00." In the case of *Gerlach Live Stock Co.* v. *Laxalt* (Nev. 1930), 284 Pac. 310, that part of a judgment representing actual damages was vacated because the evidence thereof was inadmissible for not having been pleaded; a contemporaneous award for punitive damages, however, was sustained. In *Engleman* v. *Caldwell & Jones*, supra, the Kentucky Court of Appeals sustained a jury's verdict for $5,000.00 punitive damages, where $940.00 of an award of $2,340.00 of actual damages was remitted by plaintiff, evidently for failure of proof to support that amount.

Upon consideration of the whole record, we conclude that it would be a proper disposition of this matter to withhold the granting of a new trial, upon condition that plaintiffs remit all compensatory damages in excess of $8,225. It is, therefore, ordered that, if plaintiffs-appellees shall file in the District Court a remittitur in the sum of $46,620.00 from the judgment for compensatory damages and shall cause a certified copy of such remittitur to be transmitted to this Court within thirty days of the filing of this opinion, the judgment of the District Court will be reduced to $8,225.00 compensatory and $50,000.00 punitive damages; and, as so modified, will be affirmed. Upon failure of proof of such remittitur in the manner and time above provided, the judgment of the District Court shall stand reversed with new trial ordered.

Costs of this appeal will be borne by plaintiffs-appellees.

APPENDIX B

Filed July 29, 1960

Order and Judgment

On July 28, 1960, with the parties represented by counsel and the jury as on July 25, 26, and 27, the introduction of evidence for the defendant was resumed and concluded.

Rebuttal evidence for the plaintiff was presented. At the conclusion of all evidence the Court admonished the jury and a recess was announced until 1:00 P. M.

In the absence of the jury, the plaintiffs filed a motion to be permitted to file an amended complaint. The defendant objected to the amendment in its entirety. The Court heard counsel and being advised sustained the motion and ordered that the amended complaint be filed.

The defendant by counsel, Harrison Combs, renewed its motion for a directed verdict for the defendant. The Court heard counsel and being advised overruled the moti n.

At 1:00 p.m. came the parties and the jurors as before the noon recess and closing arguments to the jury were made by Mr. Brown for the defendant and by Mr. Patterson for the plaintiffs.

* * * *

Later, the jury returned into open court and reported its verdict, to wit:

> "We, the Jury, do agree and find for the plaintiffs damages to amount of $54,845.00 and $50,000 punitive damages A total of $104,845.00.
>
> ROSA CRUTCHFIELD
> *Foreman*".

On the verdict of the jury, it is ORDERED AND ADJUDGED that the plaintiffs recover of the defendant damages in the amount of $54,845.00, punitive damages in the amount of $50,000.00, making a total of $104,845.00, and its cost herein expended.

July 29, 1960

MAC SWINFORD, *Judge*

Filed Dec. 22, 1960

Order

The motion of the defendant for an order setting aside the verdict of the jury and vacating and setting aside the judgment entered on the 29th day of July, 1960, and for judgment in accordance with the defendant's motion for a directed verdict, or in the alternative, for a new trial, is overruled. See Memorandum.

MAC SWINFORD, *Judge*

December 21, 1960

Filed May 21, 1962

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that if plaintiffs-appellees shall file in the District Court a remittitur in the sum of $46,620.00 from the judgment for compensatory damages, and shall cause a certified copy of such remittitur to be transmitted to this Court within thirty days of the filing of the opinion herein, the judgment of the District Court will be reduced to $8,225.00 compensatory and $50,000.00 punitive damages; and, as so modified, will be affirmed. Upon failure of proof of such remittitur in the manner and time above provided, the judgment of the District Court shall stand reversed with new trial ordered.

Costs of this appeal will be borne by plaintiffs-appellees.

Approved for entry:
/s/ Clifford O'Sullivan
United States Circuit Judge

Filed June 15, 1962

It appearing to the Court that the plaintiffs-appellees filed a remittitur in the District Court for the Eastern District of

Kentucky on June 7, 1962, by which the plaintiffs-appellees released and remitted the sum of $46,620.00 from the judgment for compensatory damages;

IT IS NOW ORDERED that the judgment of the District Court entered July 29, 1960, be reduced to $8,225.00 compensatory and $50,000.00 punitive damages, and, as so modified, the judgment of the District Court is hereby affirmed.

Approved for entry:
/s/ Clifford O'Sullivan
United States Circuit Judge

APPENDIX C

28 USCA 1332 reads, in part, as follows:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

". . . . . "

Labor Management Relations Act, 1947, Section 2(2) and (3) [29 USCA 152(2) and (3)]:

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly *but shall not include . . . any person subject to the Railway Labor Act . . .*

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, *but . . . shall not include . . . any individual employed by an employer subject to the Railway Labor Act . . .*

Labor Management Relations Act, 1947, as Amended September 14, 1959, Section 8(b)(4)(i) [29 USCA 158(b)(4)(i)]:

(b) It shall be an unfair labor practice for a labor organization or its agents—

". . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; . . ."

Labor Management Relations Act, 1947, Section 13 (29 USCA 163):

Right to strike preserved

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Labor Management Relations Act, 1947, Section 303 [29 USCA 187]: *Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages*

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Federal Rules of Civil Procedure:

"*Rule 17. Parties Plaintiff and Defendant; Capacity*

". . . . . .

"(b) *Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of United States to sue or be

sued in a court of the United States is governed by Title 28, U.S.C., §§ 754 and 959(a). As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949."

Section 12 of H. R. 3020 as Found in Legislative History of the Labor Management Relations Act, Vol. 1, pp. 204-207:

"SEC. 12. (a) The following activities when affecting commerce, shall be unlawful concerted activities:

"(1) By the use of force or violence or threats thereof, preventing or attempting to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer; or by the use of force, violence, physical obstruction, or threats thereof, preventing or attempting to prevent any individual from freely going from any place and entering upon an employer's premises, or from freely leaving an employer's pre ses and going to any other place; or picketing an employer's place of business in numbers or in a manner otherwise than is reasonably required to give notice of the existence of a labor dispute at such place of business; or picketing or besetting the home of any individual in connection with any labor dispute.

"(2) Picketing an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer.

"(3) Calling, authorizing, engaging in, or assisting—

"(A) any sympathy strike, jurisdictional strike, monopolistic strike, or illegal boycott, or any sit-down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises;

"(B) any strike or other concerted interference with an employer's operations, an object of which is to compel an employer to accede to featherbedding practices;

"(C) any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining

a representative not certified under section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law or regulation, order, or direction issued pursuant to any law.

"(4) Any conspiracy, collusion, or common arrangements between competing employers to fix or agree to terms or proposed terms of employment of their employees, or to subject such terms or proposed terms of employment to common control or approval, and permitted as to their employees, or as to the representatives of their employees, with respect to the collective bargaining, concerted activities, or terms of collective bargains or arrangements of such employees.

(b) Any person injured in his business, person, or property by an unlawful concerted activity affecting commerce may sue the person or persons responsible therefor in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, and may recover the damages sustained by him as a result of such unlawful concerted activity, together with the costs of the suit, including a reasonable attorney's fee.

"(c) No provision of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes', shall have any application in any action or proceeding in a court of the United States involving any activity defined in this section as unlawful.

"(d) A person who is found to have engaged in any activity herein defined as an unlawful concerted activity shall be subject to deprivation of rights under this Act to the same extent as a person found to have engaged in an unfair labor practice under section 8(b) or 8(c).

"(e) Except as specifically provided in this section, nothing in this Act shall be construed to diminish the right of employees to strike or to engage in other lawful concerted activities. No provision of this Act, and no order of any court

issued hereunder, shall be construed to require any individual to perform labor or service without his consent."

1957 Annual Report, National Labor Relations Board, p. 98:

"In the view of the majority, section 8(b)(4) is violated only by inducement of strike action by employees, as defined in section 2(3), of an employer as defined in section 2(2). These definitions, according to the majority, are controlled because all section 2 definitions are expressly made to apply generally 'when used in this Act,' without exception. Congress' intent being thus manifest, the majority of the Board held that the use of the phrase 'any *employer*' in section 8(b)(4) could be given no meaning other than 'any employer' within the definition of section 2(2), and could not be taken to express an intent to extend the protection of section 8(b)(4) to employers outside the definition of section 2(2). The majority further pointed out that to interpret 'employees of any employer' as broadly as proposed would result in having the Board regulate labor relations of employers which Congress clearly meant to exclude from the act's operation . . . *the majority concluded that a 'secondary boycott by a railroad union or union of municipal employees does not violate section 8(b)(4)(A) even if such a boycott involves inducement of employees of neutral employers subject to the Act.'*"

Excerpts from Legislative History of the Labor Management Reporting and Disclosure Act of 1959, Vol. II:

Senator Curtis (p. 989):

"These loopholes which permit unions to instigate effective secondary boycotts should be closed, and the effect of the secondary boycott provisions of this bill will be to close them".

Senator McClellan (p. 1193):

"the Taft-Hartley law excludes railway . . . employees. They are not now covered by the law. The amendment would include those employees".

Representative Griffin (p. 1522):

"Since . . . railway labor . . . are not 'employees' within the meaning of the Act, unions may now without penalty induce them to engage in secondary boycotts. This bill corrects this by changing the word 'employees' in the phrase quoted above to 'any individual employed by any person.'"

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6699

UNITED MINE WORKERS OF AMERICA AND UNITED MINE WORKERS OF AMERICA, DISTRICT 28, Appellants,

versus

RUDD PATTON, GILBERT BAILEY, NORMAN SUTHERLAND AND W. C. LAMBERT, Partners D/B/A Laurel Branch Coal Company, Appellees

Appeal from the United States District Court for the Western District of Virginia, at Abingdon

Argued January 6, 1954. Decided March 15, 1954

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges

* * * * *

PARKER, Chief Judge:

This is an appeal from a judgment in favor of plaintiffs in an action to recover damages under the provisions of the Labor Management Relations Act. Plaintiffs are partners who were engaged in conducting a mining operation in the coal fields of Western Virginia. Defendants are the United Mine Workers of America and District 28 of that organization. The basis of the action is that the defendants by a strike at the mines of the Clinchfield Coal Corporation caused that corporation to cease doing business with plaintiffs and that this resulted in the destruction of plaintiffs' business. There was a trial before a jury which found in favor of plaintiffs and awarded them actual damages in the sum of $150,000 and punitive damages in the sum of $75,000. From judgment on this verdict the defendants have appealed. Four principal questions are presented by the appeal: (1) whether the evidence was sufficient to take the case to the jury, (2) whether punitive damages were recoverable under the statute; (3) whether there was prejudicial error in the admission of testimony; and (4) whether there was prejudicial error in the charge of the court.

* * * * *

2. *The question of Punitive Damages*

While we think that there was sufficient evidence to take the case to the jury on the question of actual damages, we thank there was error in allowing the jury to award punitive damages. This is not a case brought under the diversity jurisdiction of the federal court to enforce a common law liability, where we are governed by state decisions and would be bound on the question of punitive damages [fol. 296] by the decision of the Supreme Court of Appeals of Virginia in *United Construction Workers et al.* v. *Laburnum Const. Corp. supra,* 194 Va. 872, 75 S.E. 2d 694. There is no diversity of citizenship and the plaintiffs are entitled to invoke the jurisdiction of the federal courts only because they sue on a cause of action created by a federal statute, i.e. on the cause of action created by section 303(b) of the Labor Management Relations Act, 29 USC 187(b), heretofore quoted. That section makes no provision for the recovery of punitive damages; but on the contrary provides expressly that the aggrieved party "shall recover *the damages by him sustained* and the cost of the suit". (Italics supplied). "Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff." *Washington Gas Light Co.* v. *Lansden,* 172 U.S. 534, 553, 15 Am. Jur. p. 700.

Where Congress has intended that damages in excess of the actual damage sustained by plaintiff may be recovered in an action created by statute, it has found no difficulty in using language appropriate to that end. Thus, in copyright cases (17 USC 1), in patent cases (35 USC 67), and in antitrust cases (15 USC 15), the right to recover treble damages is expressly given. There is nothing in the language of the statute here under consideration, however, or in its history, that indicates that Congress intended that anything more than actual damages be recovered. In the Senate debate on the bill, Senator Taft said (93 Cong. Record 5060, Legislative History of Labor Management Relations Act vol. 2, p. 1371):

> "I think, since the sentiment of the Senate is against the injunctive process, I see no reason why suits of [fol

297] this sort should not be permitted to be filed. After all, it is only to restore to people, who lose something, because of boycotts and jurisdictional strikes, the money which they have lost."

Later in a colloquy with Senator Morse, who was insisting that the effect of the statute would be to inflict unconscionable punishment upon unions engaging in a boycott, and had argued that there was no parallel in other statutes for imposing such liability, Senator Taft said (93 Cong. Record p. 5074, Legislative History of the Labor Management Relations Act vol. 2 p. 1398):

> "The Senator asks for a parallel, and I can give him one. Under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees In this case we simply provide for the amount of the actual damages."

In the absence of anything in the act itself or in its history indicating an intention on the part of Congress to authorize the recovery of punitive damages by this highly controversial legislation, the courts would not be justified, we think, in construing it to permit such recovery. In *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 4 Cir. 167 F. 2d 183, 186, which dealt with the same statute, we quoted with approval the language of the Supreme Court in a case involving the Railway Labor Act to the effect that, "The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." We are still of that opinion. In the light of the history of recent labor legislation, it is hardly conceivable that Congress could have intended to vest in the courts the power to punish unions by awards of punitive damages. Certainly, [fol. 298] in the struggle over this act, which was vetoed by the President and passed by the Congress over his veto, no one ever suggested, so far as we are advised, that punitive damages could be awarded under its provisions.

APPENDIX E

Pending Cases

Style	Civil Action No.	Court	Amount*	Date Filed
Clyde Meeks v. UMWA	3851	U.S.D.C. E.D. Tenn. Southern Division	$12,500 $12,500	Feb. 8, 1962
Paul Gibbs v. UMWA	3771	U.S.D.C. E.D. Tenn. Southern Division	$250,000 $100,000	Aug. 23, 1961
White Oak Coal Corp. Inc. & Arnold Coal Co. v. UMWA	14,873	U.S.C.A. 6 Cir.	$185,000 $125,000	
Lyle F. Kennedy dba Lyle Coal Co. v. UMWA	4194	U.S.D.C. E.D. Tenn. Northern Division	$100,000 $50,000	Feb. 24, 1961
Joe R. Allen & Margaret S. Allen dba Allen Trucking Co., Kyle E. Duncan, Walter Mahorn, Jr., & Henry Melhorn v. UMWA	4191	U.S.D.C. E.D. Ky. Northern Division	$420,000 $200,000	Feb. 24, 1961
Double Camp Mining Co. v. UMWA	4193	U.S.D.C. E.D. Tenn. Northern Division	$950,000 $500,000	Feb. 24, 1961
William R. Parton dba Parton Coal Co. v. UMWA	4192	U.S.D.C. E.D. Tenn. Northern Division	$400,000 $150,000	Feb. 24, 1961

*The first amount represents *compensatory* damages, and the second amount, *punitive* damages.

Style	Civil Action No.	Court	Amount*	Date Filed
Dewey Cook, Jr., Individually & Trading as Days Branch Darby Coal Co. v. UMWA and District 19, UMWA	1166	U.S.D.C. E.D. Ky. London Division	$60,000	Nov. 6, 1961
Mitchell Coal Co., Inc. v. UMWA	1060	U.S.D.C. E.D. Ky. London Division	$150,000 $150,000	Dec. 3, 1959
R. P. Price, C. H. Kelly & Follace Fields, Partners, dba Elkhorn Coal Co. v. UMWA	15,046	U.S.C.A. 6 Cir.	$150,000 $100,000	July 2, 1962
Emmett Blair & Jack W. Blair, t/a Blair-Elkhorn Mining Co. v. UMWA & UMWA, District 30	572	U.S.D.C. E.D. Ky. Pikeville Division	$300,000	Aug. 12, 1959
East Kentucky Collieries, Inc. v. UMWA	552	U.S.D.C. E.D. Ky. Catlettsburg Division	$75,000 $150,000	Jan. 16, 1961
Billy Addington dba A & A Coal Co. v. UMWA	551	U.S.D.C. E.D. Ky. Catlettsburg Division	$213,000 $75,000	Oct. 6, 1959
Sunfire Coal Co. & Ashlo Coal Co. v. UMWA	14,832	U.S.C.A. 6 Cir.	$264,000	Dec. 4, 1961

*The first amount represents *compensatory* damages, and the second amount, *punitive* damages.

Style	Civil Action No.	Court	Amount*	Date Filed
Scuddy Coal Co. v. UMWA	296	U.S.D.C. E.D. Ky. Jackson Division	$605,000 $605,000	Aug. 4, 1959
Chester Railing & Paul Railing, dba C & P Coal Co. v. UMWA	698-F	U.S.D.C. N.D. W. Va. Fairmont Division	$1,120,000 $300,000	July 14, 1961
Cecil L. Kinty, dba Kinty Trucking Co. v. UMWA	699-F	U.S.D.C. N.D. W. Va. Fairmont Division	$115,000 $40,000	July 14, 1961
Bertsel Kittle, dba Kittle Trucking Co. v. UMWA	700-F	U.S.D.C. N.D. W. Va. Fairmont Division	$53,500 $25,000	July 14, 1961
Chester Sinsel, dba Sinsel Coal Co. v. UMWA	701-F	U.S.D.C. N.D. W. Va. Fairmont Division	$240,000 $75,000	July 14, 1961
Thomas J. Gates, dba Dorothy Coal Co. & Gates Trucking Co. v. UMWA	702-F	U.S.D.C. N.D. W. Va. Fairmont Division	$245,100 $100,000	July 14, 1961
Green Valley Mining Co., Inc. v. UMWA	703-F	U.S.D.C. N.D. W. Va. Fairmont Division	$322,500 $100,000	July 14, 1961
Blue Ridge Coal Co., Inc. v. UMWA	704-F	U.S.D.C. N.D. W. Va. Fairmont Division	$161,300 $60,000	July 14, 1961

*The first amount represents *compensatory* damages, and the second amount, *punitive* damages.

Style	Civil Action No.	Court	Amount*	Date Filed
Lawrence Layman dba Layman Coal Co. v. UMWA	705-F	U.S.D.C. N.D. W. Va. Fairmont Division	$61,000 $10,000	July 14, 1961
Louis Marra & Sam Marra dba Marra Bros. Coal Co. v. UMWA	1134	U.S.D.C. N.D. W. Va. Fairmont Division	$210,000 $50,000	July 14, 1961
James W. Thompson dba Thompson Coal & Construction Co. v. UMWA	708-F	U.S.D.C. N.D. W. Va. Fairmont Division	$120,000 $50,000	July 14, 1961
Louis Marra dba M & T Coal Co. v. UMWA	707-F	U.S.D.C. N.D. W. Va. Fairmont Division	$93,500 $50,000	July 14, 1961
Orlanda Lacara dba P & J Coal Co. v. UMWA	709-F	U.S.D.C. N.D. W. Va. Fairmont Division	$125,800 $40,000	July 14, 1961
TOTALS:				
Compensatory Damages			$7,002,200	
Punitive Damages			$3,117,500	

*The first amount represents *compensatory* damages, and the second amount, *punitive* damages.

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 349.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

FLAME COAL COMPANY, CO-DEE COAL COMPANY and AMANDA COAL COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 349.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

FLAME COAL COMPANY, CO-DEE COAL COMPANY and AMANDA COAL COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents Flame Coal Company, Co-Dee Coal Company and Amanda Coal Company in opposition to the petition for writ of certiorari filed herein, respectfully represent:

QUESTIONS PRESENTED.

1.

In an action under Section 303, Labor Management Relations Act of 1947, against a labor union for damages claimed to have resulted from a labor dispute wherein plaintiffs contended that certain tactics of defendant constituted violations of Section 303 by the union and that the union's entire course of conduct during the dispute also constituted unlawful interference with plaintiffs'

businesses violative of State common law, did the District Court have jurisdiction to determine liability under the common law or non-Federal grounds asserted in support of the single cause of action?

2.

Assuming, for the purpose of argument, that as a prerequisite to their right to maintain the action, plaintiffs were required to show by evidence that the Union had been guilty of a secondary boycott, was the conflicting evidence in this case sufficient as a matter of law to permit a finding that the Union had engaged in such boycott?

3.

Where the common law of a state permits recovery of punitive damages for wilful and malicious wrong, and one of the grounds supporting an alleged cause of action is based upon violation of such common law, and the evidence shows violence and intimidation sufficient to establish such a violation, is the Federal Court precluded from awarding such damages because jurisdiction is conferred upon it by a supporting ground charging violation of Section 303, Labor Management Relations Act of 1947?

4.

Was Rule 51, Federal Rules of Civil Procedure, complied with in such manner as to preserve petitioner's right to complain of the trial court's refusal of a proffered instruction, and, if so, was such ruling erroneous where the instruction was improperly drawn and the trial court's charge as a whole fairly covered the subject of same?

STATEMENT OF THE CASE.

The Evidence.

The facts in this case (and evaluation of them) were summarized by the Court of Appeals, concisely, dispassionately, and with a careful restraint. Since the picture painted by petitioner UMW differs so widely from that portrayed by the court, it seems appropriate to demonstrate that the judicial resumé of the facts is in accord with the record. Therefore, the respondents quote from the opinion below, supplying only record references and a few brief notes considered to be significant.

"Plaintiffs, Flame Coal Company, Co-Dee Coal Company and Amanda Coal Company, are Kentucky Corporations, referred to herein as Flame, Co-Dee and Amanda (R. 73a-74a). At the time of the alleged wrongs, Co-Dee and Amanda were engaged in the auger mining of coal in Eastern Kentucky (R. 73a-74a). The coal mined by them was sold to Flame (R. 74a, 87a, 507a, 508a), and transported by independent truckers to the premises of Flame (R. 75a, 92a, 219a, 223a, 230a, 256a, 262a) where it was processed and loaded into railroad cars for shipment to Flame's customers (R. 74a). Flame, Co-Dee and Amanda are controlled by one person, Mrs. Virginia C. Collins, who is the principal stockholder of each, but each had one or more stockholders not common to the others (R. 127a, 128a, 141a).

"Plaintiffs were among one hundred and seventy-six (176) coal companies in the southeastern Kentucky-northeastern Tennessee region which had not signed the National Bituminous Coal Wage Agreement of 1950, as amended in 1958 (R. 357a-358a, 373a). In the spring of 1959, starting about March 17, the defendant, United Mine Workers of America, carried on a campaign to obtain

agreements with unsigned companies, including plaintiff Flame (R. 358a, 373a, 376a-377a). The campaign was conceived and prosecuted on a grand scale (R. 358a-362a, 389a). Spectacular and varied methods were employed. Mass picketing at the tipple sites (R. 91a-92a, 196a, 272a, 274a, 276a, 280a), on the highways (R. 146a, 200a), on railroad sidings (R. 166a, 176a), and at the mines (R. 233a)[1] was carried on. Pickets, sometimes numbering in excess of a thousand men, roamed throughout the area in motor convoys (R. 93a, 196a, 200a, 276a). The persuasion of sheer numbers was supplemented by more violent and forceful methods. Trucks were stopped at tipples (R. 258a, 275a-276a), and on the way to and from them (R. 225a); their loads were dumped on, and off of, the highway (R. 98a, 147a, 278a). Mine and tipple workers were beaten (R. 277a-278a). Strong threats of violence were made to the independent truck drivers to persuade them to discontinue transporting coal from the mines to the tipples (R. 155a, 259a). After April 30, 1959, when mass picketing was substantially discontinued because of a federal court injunction (there was evidence by defendant that the picketing convoys were stopped because troublesome strangers were joining them (R. 363a, 392a-393a)) the pattern of coercion took a different and still more violent turn. Railroad tracks and bridges were dynamited (R. 102a-105a, 163a, 171a-173a), as were tipples (R. 198a, 283a), trucks (R. 287a) and other equipment (R. 102a, 202a). In fulfillment of a prophetic warning to truckers and others that 'when the leaves come out on the trees' more convincing methods would be employed (R. 155a), the Flame tipple was put under gunfire from the nearby

[1] Actually, there was little evidence of picketing at "mines." The picketing was aimed principally at tipples and preparation plants which were the outlets for mines (R. 146a-147a).

hills almost daily (R. 100a, 184a, 209a). There was evidence that guards at the tipple, on some occasions, returned the fire (R. 187a).

"The web of persuasion extended over a wide area (R. 344a-345a). Mass picketing at the Flame tipple prevented the processing of coal there (R. 93a-94a, 183a, 187a). Mass picketing at a railroad switching point prevented the removal of coal from the tipple (R. 95a-97a). Trucks and automobiles were struck by bullets (R. 184a-185a, 231a, 262a-263a) and that, with other threats, violence and interference, persuaded truckers to give up hauling coal from the Co-Dee and Amanda mines to the Flame tipple (R. 98a, 185a, 208a, 224a, 232a, 257a, 264a-265a, 287a). On eight different occasions, the railroad spur track leading to the tipple was dynamited (R. 105a, 163a).[1]

"Field representatives of defendant United Mine Workers directed and led the convoys of pickets (R. 199a, 381a, 401a) and were present at or near the scene of much of the described violence (R. 153a, 193a-196a, 273a-279a). These field men were selected and appointed by the President of District 30 of the defendant United Mine Workers (R. 381a). The events here involved occurred within District 30 (R. 344a).[2] Specific identification of the riflemen in the hills, the dynamiters, and other individuals, perpetrators of violence and threats, was not made (R. 163a, 174a, 189a, 209a, 217a). Defendant's witnesses testified of instructions given to the members of the convoys to behave themselves and not violate the law (R. 360a-

---

[1] Tracks were dynamited seven times. One of these eight blasts was in destruction of a "pole" (R. 102a).

[2] From March 2, until June 29, the International Union poured over $1,000,000.00 into District 30 in support of the strike and strikers (R. 379a).

361a, 389, 398a).[1] Our review of the record, however, satisfies us that there was admissible and competent evidence from which the jury could infer and find that defendant union was the author of, and responsible for, the violence and illegal conduct which effectively interrupted and interfered with the business of plaintiffs. The evidence was sufficient to support a verdict and judgment requiring defendant union to respond in damages for the acts of its members, agents and representatives."

SUMMARY OF ARGUMENT.

1.

Petitioner's attack on the applicability of the doctrine of ancillary or pendent jurisdiction in a case involving an alleged violation of Section 303, Labor Management Relations Act, has been unsuccessfully urged by it in three recent, prior decisions of the Court of Appeals for the Sixth Circuit, in each of which certiorari has been denied. The fact that the common law ground, if tried alone as an independent cause of action in the State court, would have taken the procedural form of a class suit, rather than a suit against a jural entity does not affect the applicability of this doctrine. The contention that its applicability is affected by the principle of federal preemption has been twice rejected by this Court in cases where the union's activity was marked with violence and intimidation, as is the case here.

2.

Argument under Question 2 presented by petitioner seeks a review by this Court of voluminous evidence from

---

[1] One of these leaders (who testified of admonitions to pursue good behavior) violated an injunction of the United States Court, pled guilty, was fined and jailed, continued to receive his salary, and later was promoted by UMW (R. 348a, 380a-381a).

which varied inferences could reasonably be drawn, and asks the Court to draw inferences and reach a conclusion of fact in accord with petitioner's argument. Certiorari should not be granted for the purpose of reviewing conflecting evidence, or evidence from which differing inferences may validly be drawn, in a case which has no special or important public significance, concerns no Constitutional question or right, and which in its evidential aspects has become merely academic by the enactment of subsequent legislation.

3.

The argument that a federal court, which has jurisdiction conferred upon it under an alleged violation of a provision of the Labor Management Relations Act, cannot allow recovery of punitive damages for a violation of the State common law, alleged in the same action, has been twice rejected by this Court in cases where the union activity complained of was marked with violence and intimidation, as is the case here.

4.

To the trial court's refusal of petitioner's proffered Instruction IV, only a general exception was taken, for which reason the action of the court is not subject to review. However, had proper objection been taken, the ruling of the trial court was correct, as the proffered instruction was erroneous, in that it would eliminate as a proscribed objective of Section 303 of the Act the union's inducement of employees of other employers to force their employers to cease doing business with respondents. It was also erroneous in that it would change the doctrine of ancillary jurisdiction so as to make a favorable decision on the federal question a prerequisite to the

court's jurisdiction over the common law claim. A reading of the instructions as a whole discloses that the trial court adequately covered the subject of petitioner's proffered instruction.

THE ARGUMENT.

QUESTION NO. 1.

Doctrine of ancillary or pendent jurisdiction as followed by lower court is supported by applicable decisions of this Court.

Petitioner denies the jurisdiction of the district court to entertain a case where a claim under Section 303 of the Labor Management Relations Act of 1947 (29 U. S. C. A. 187) is joined with a non-federal common law action for tort, saying that the rule of ancillary or pendent jurisdiction is inapplicable because, (1) if the common law ground was tried alone as an independent cause of action in a State court, it would take, in this particular instance, the procedural form of a class suit rather than a suit against a jural entity, and (2) it is precluded by the doctrine of federal preemption.

Basically, this is the same question which has been considered and disposed of, contrary to petitioner's contention, in the cases of *United Mine Workers v. Meadow Creek Coal Co.*, 263 F. 2d 52 (C. A. 6, 1959), cert. denied 359 U. S. 1013; *United Mine Workers of America v. Osborne Mining Company*, 279 F. 2d 716 (C. A. 6, 1960), cert. denied 364 U. S. 881; *Gilchrist v. United Mine Workers of America*, 290 F. 2d 36 (C. A. 6, 1961), cert. denied 368 U. S. 875.

Specifically, in the *Gilchrist* case, the question was put to the appellate court in the following form:

> "In an action against the defendant union, an unincorporated association, predicated upon an alleged viola-

tion of Federal law, which law permits an action against such a labor organization as an entity, did the Court have jurisdiction to render judgment against the defendant in part under the common law of the State of Kentucky, even though the law of Kentucky does not recognize an unincorporated labor organization as a jural entity subject to suit?"

In its petition for certiorari in *Gilchrist*, the petitioner contented itself with submission of the basic question here involved in the following form:

"In an action against a labor union for damages claimed to have resulted from a labor dispute under Section 303 of the Act wherein plaintiffs contended that certain actions which occurred during the dispute constituted violations of Section 303 by the union and that the union's entire course of conduct during the dispute constituted unlawful interference with plaintiffs' businesses violative of State common law, did the District Court have jurisdiction to determine liability under the common law or non-Federal cause of action?"

While petitioner seeks to persuade the Court that the requirement in Kentucky state courts that a union, or other voluntary association, be proceeded against in a class action, rather than sued as a jural entity, is a matter of substance, as distinguished from a procedural matter concerning merely the manner and the means by which a right to recover is enforced, this argument is not supported by the law of Kentucky.

Voluntary unincorporated associations are considered legal entities in Kentucky. In *International Union of Operating Engineers v. Bryan*, Ky., 255 S. W. 2d 471, 474, the Court stated:

"The distinction between an unincorporated labor union and a corporation is apparent. Although re-

garded as a legal entity, an unincorporated union is a voluntary association which is not distinct from its individual members, as a corporation from its stockholders."

That the bringing of suit against a voluntary association in Kentucky by class action is merely procedural is demonstrated by the following rulings of the Court of Appeals of Kentucky. In *U. M. W. A. v. Comer*, 159 Ky. 605, 167 S. W. 891, this same petitioner was held responsible for damages arising out of libel, and its argument that it was immune to suit was disregarded in view of the fact that it took no steps to raise a question as to the procedural form of action by which it was brought into court. The same result was reached by the Court in the case of *Hotel, Restaurant & Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S. W. 2d 501.

The District Court accurately resolved the question posed by petitioner as to the procedural form of the suit with reference to Kentucky law with the following statement (R. 68a-69a):

"Defendant's contention that this suit would have failed in a state court is more speculative than real. If the suit would have failed as brought, such failure would have been on procedural rather than substantive grounds. But the suit was brought in this court and satisfies the procedural requirements thereof. Who can say that the plaintiffs would not have proceeded differently, and so satisfied the Kentucky procedural requirements, if the action had been brought in a state court? In any event, the contention is immaterial since Rule 17(b)(1), Federal Rules of Civil Procedure, renders the defendant subject to suit in federal court for enforcement of substantive rights arising under laws of the United States. This is such a suit."

On the subject of lack of diversity, the trial court made the following observation (R. 67a):

> "Here, however, one of the grounds of the cause of action was alleged under Section 303 of the Labor-Management Relations Act (29 USCA 187). By subsection (b) thereof, the suability of labor organizations is established and jurisdiction in such cases is conferred upon this court. Since jurisdiction arises under the laws of the United States (28 USCA 1331), it is elementary that the diversity requirement of 28 USCA 1332 need not be satisfied."

The Court of Appeals also specifically ruled upon this question, following the reasoning of the trial court, making this conclusion (Appendix to Petition, iv):

> "However, federal jurisdiction attached here because of the secondary boycott and under Rule 17(b) F. R. Civ. P. defendant, an unincorporated association, is suable as such and in the federal court may be made to respond in damages for its tortious conduct (29 U. S. C. A. 187). Gilchrist v. United Mine Workers of America, supra (290 F. [2] 39); United Mine Workers of America v. Osborne, supra (279 F. [2] 716)."

Rather than being "a federal question important in the construction and administration of the Act's Section 303," as averred in the petition (p. 20), it is submitted that this is merely a procedural question which under all applicable law is controlled by Rule 17(b)(1), Federal Rules of Civil Procedure.

But, in addition to the attack on the jurisdiction of the District Court based upon the procedural law of Kentucky, in support of the basic question of the applicability of ancillary or pendent jurisdiction in an action under Section 303, Labor Management Relations Act, petitioner asserts that such jurisdiction is precluded by the doctrine of "federal preemption," and that the ruling of the District Court and the ruling of the Court of Appeals to the contrary is a departure from the decisions of this Court.

In applying the doctrine of ancillary or pendent jurisdiction, the party against whom it is invoked usually makes the contention that his type of action should be an exception to the rule. The Court gives full answer to this argument in the case of *Hurn v. Oursler*, 289 U. S. 238, in response to the question of whether cases involving patents, trademarks and copyrights constitute an exception to the general rule, as follows (p. 245):

> "The Siler and like cases announce the rule broadly without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such—as controlling in patent, trademark and copyright cases as it was in the cases where it is announced."

In the response to the assertion of this basic question upon petition filed in the *Osborne* case, and in response to same upon petition filed in the *Gilchrist* case, numerous cases were briefly referred to in support of the declaration in the *Hurn v. Oursler* case that this is "a rule of general application." We again call these cases to the attention of the Court. The rule has been applied:

(1) In cases involving a claim in the field of federal patent or trademark law with an accompanying state unfair competition claim in such cases as *Hurn v. Oursler, supra; Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315 (1939); *in re Amtorg Trading Corp.*, 75 Fed. 2d 826 (Ct. of Patent App., 1935); *Edelman & Co., v. AAA Specialty Company*, 88 Fed. 2d 852 (7th Cir., 1937); *Sinko v. Snow-Craggs Corporation*, 105 Fed. 2d 450 (7th Cir., 1939); *Maternally Yours v. Your Maternity Shop*, 234 Fed. 2d 538 (2nd Cir., 1956).

(2) Under the Jones Act wherein claims are combined for unseaworthiness and maintenance and cure with

an admiralty claim in such cases as *Jordine v. Walling*, 185 Fed. 2d 662 (3rd Cir., 1950); *Troupe v. Transit Company*, 234 Fed. 2d 253 (2nd Cir., 1956); *Doucette v. Vincent*, 194 Fed. 2d 834 (1st Cir., 1952).

(3) In cases wherein claims under the Federal Transportation Acts are combined with claims under the state or common law in such cases as *Southern Pacific Company v. Van Hoosar*, 72 Fed. 2d 903 (9th Cir., 1934); *Strachman v. Palmer*, 177 Fed. 2d 427 (1st Cir., 1949); *Chicago Great Western Railway Co. v. Chicago, Burlington and Quincy Railway Co.*, 193 Fed. 2d 975 (8th Cir., 1952).

(4) In cases wherein a claim under the Federal Securities and Exchange Act is combined with a state or common law claim for fraud in such cases as *Errion v. Connell*, 236 Fed. 2d 447 (9th Cir., 1956); *Jung v. K & D Mining Co.*, 260 Fed. 2d 607 (7th Cir., 1958).

(5) In cases wherein claims under the Sherman and Clayton Acts are combined with claims under the state law or common law dealing with monopoly or trusts in such cases as *Southside Theatres v. United West Coast Theatres Corporation*, 178 Fed. 2d 648 (9th Cir., 1949); *Braddick v. Federation of Shorthand Reporters*, 115 F. Supp. 550 (S. D. N. Y., 1953).

(6) In cases wherein claims under the Fair Labor Standards Act are combined with claims for compensation outside of said acts in such cases as *Manosky v. Bethlehem Hingham Shipyard*, 177 Fed. 2d 529 (1st Cir., 1949); *Hogue v. National Automatic Parts Association*, 87 Fed. Supp. 816 (E. D. Mich., 1949); *Wertanen et al. v. Welduction Corporation*, 151 Fed. Supp. 440 (E. D. Mich., 1957).

(7) In cases wherein claims under statutes relating to national banks are combined with claims under the state

or common law in such cases as *Gulley v. First National Bank of Meridian*, 81 Fed. 2d 502 (5th Cir., 1936).

(8) In cases wherein a claim complying with the diversity of citizenship and jurisdictional amount requirements is combined with a claim which does not comply with such requirements in such cases as *American Fidelity & Casualty Company v. Owensboro Milling Company*, 222 Fed. 2d 109 (6th Cir., 1955).

Applicable to this case, as in the *Osborne* case, and in the *Gilchrist* case, is the quotation from *Errion v. Connell*, 236 Fed. 2d 447, 454:

> "It is alleged in the complaint in our case, and the trial court found, a single cause of action involving a single fraudulent scheme to defraud Mrs. Connell of her property. There were involved two types of property, one being securities over which the Federal Court had jurisdiction, and the other non-securities over which the Federal Court normally has no jurisdiction. But the single fraudulent scheme arising out of the same set of facts encompassed both types of property. The thought of requiring two lawsuits in this situation is untenable. We, therefore, hold that the trial court could correctly award damages for the entire fraudulent scheme, even though non-securities were involved."

Petitioner's argument that the application of the rule of ancillary or pendent jurisdiction as expressed in the case of *Hurn v. Oursler* conflicts with the decisions of this Court because of the doctrine of federal preemption is without merit. This specific question has been considered by the Court and has been disposed of, contrary to petitioner's contention, in the cases of *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, and *International Union, U. A. A. & A. I. W. v. Russell*, 356 U. S. 634.

In *Laburnum*, in dealing with the doctrine of federal preemption, and speaking of the federal statute which is before the Court in this action, it was said (p. 666):

> "To recover damages under that section is consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common-law liabilities generally. On the other hand, it is not consistent to say that Congress in that section, authorizes court action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us."

In *International Union, etc., v. Russell*, 356 U. S. 634, a union and its agent were sued in a state court for malicious interference with an employee's lawful occupation. It was contended that the alleged wrongful acts constituted unfair labor practices under the Labor Management Relations Act 1947, and that there was such federal preemption in this area of legislation as to deprive the state court of jurisdiction. This Court referred to its holding in the *Laburnum* case, and to the contention immediately before it saying (pages 641-642):

> "This case is similar to Laburnum in many respects. In each, a state court awarded compensatory and punitive damages against a union for conduct which was a tort and also assumed to be an unfair labor practice. The situations are comparable except that, in the instant case, the Board is authorized, under § 10(c) of the Federal Act, to award back pay to employees under certain circumstances. We assume, for the purpose of argument, that the Board would have had authority to award back pay to Russell. Petitioners assert that the possibility of partial relief distinguishes the instant case from Laburnum. It is our view that Congress has not made such a distinction and that it has not, in

> either case, deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered."

And again, on page 645 of the opinion, the Court stated:

> "If the employee's common-law rights of action against a union tortfeasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed during the strike in the present case."

In the case of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, cited in the petition, this Court distinguished its holding there from its rulings in *Laburnum* and in *United Auto Workers v. Russell*, stating that in those cases "* * * we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order." (p. 247.) Here, as in *Laburnum* and *Russell*, the activities of the petitioner were marked with mass picketing, dynamiting, shooting, violence and intimidation. The type of conduct which made the doctrine of federal preemption inapplicable in those cases also makes that doctrine inapplicable in the instant case.

QUESTION NO. 2.

This Court does not grant certiorari for mere review of evidence, but were the rule otherwise, the evidence here supports the findings of the jury and the conclusions of the two courts below.

On this question the petitioner is asking the Court to grant certiorari because "the evidence did not suffice as a matter of law to sustain a Section 303 violation." That the evidence was conflicting and susceptible of widely differing interpretations can easily be seen by comparing the peti-

tioner's version (in its petition) with the version of the Court of Appeals (heretofore quoted). In short, petitioner asks this Court to review voluminous and conflicting evidence to see whether or not it supports a factual conclusion.

It is doubtful that such a task is the proper responsibility of this Court, or within the realm of that function which the Court was intended to serve in our federal judicial system.

Apparently, it is not even contended that the question is one of any significant public concern. It is important only to the litigants. Under varying circumstances, individual members of this Court have often expressed reservations about dissipating the time and energy of the Court in weighing evidence that has been subjected to the scrutiny of two courts below.[5] Whatever may have been the division of opinion among the members of the Court as to the nature of questions presenting a breadth of consequence sufficient to justify certiorari, the Court has made it clear that, as a general proposition, it does not engage in a mere review of evidence unless there is some important and compelling reason for so doing.[6] As Mr. Justice Black stated in *National Labor Relations Board v. Waterman Steamship Corporation*, 309 U. S. 206, "We do not ordinarily grant certiorari to review judgments based solely on questions of fact."

Petitioner asserts that certiorari should be granted because, as it says, there are some twenty-seven cases pending against it which involve total claims of approximately

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[5] *New York, New Haven & Hartford Railroad Co. v. Henagan*, 364 U. S. 441; *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107; *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 518; *Carter v. Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 437; *Wilkerson v. McCarthy*, 336 U. S. 53, 64.

[6] *Houston Oil Co. of Texas, et al., v. Goodrich, et al.*, 245 U. S. 440; *United States v. Johnston*, 268 U. S. 220.

ten million dollars,[7] and "which are concerned with the question of conduct necessary to come within the proscriptions of the federal statute."

There have been four of these cases in the United States Court of Appeals for the Sixth Circuit, including the present case. *Osborne*[8] followed *Meadow Creek*,[9] and it was indicated that the factual pattern in the second case was unlike the first. *Gilchrist*[10] was next, and it was said that it differed from *Osborne* in material factual particulars. The present litigation was next, and in the Court of Appeals the petitioner undertook to demonstrate that the particular facts in this case should not be governed by the decisions in the preceding cases. If the petitioner is now suggesting that the twenty-seven cases presently pending against it involve factual situations which concern "the question of conduct necessary to come within the proscription of the federal statute" (p. 34), and therefore will be forthcoming for review in this forum, it is hardly an inducement to grant certiorari in the present instance.

Whether or not a secondary boycott has been perpe-

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[7] In a petition for writ of certiorari in *UMWA v. Osborne Mining Company*, 6 Cir. 279 F. 2d 716, cert. den., 364 U. S. 881, petitioner displayed to the Court some twenty-five cases against it involving claims which totaled over twenty-four million dollars.

When petitioner was seeking certiorari in *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36, cert. den., 368 U. S. 875, it complained that it was defendant in some twenty-two suits which involved claims totaling over eighteen million dollars.

Thus, though the number of its problems have not materially diminished, the potential of its anxiety is now reduced by more than one-half.

[8] *UMWA v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den., 364 U. S. 881.

[9] *UMWA v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. den., 359 U. S. 1013.

[10] *Gilchrist v. UMWA*, 6 Cir., 290 F. 2d 36, cert. den., 368 U. S. 875.

trated involves (1) conduct and (2) objectives (3) within a given pattern of circumstances. These factors can only be measured in terms of evidence bearing upon them, and such evidence (particularly in the realm of objectives) is susceptible of differing interpretations and convictions. To suggest that this Court invite the burden of resolving such problems in the numerous cases pending against petitioner is to ask the Court to do that very thing which it has said it has neither the opportunity nor duty to do.

Petitioner contends that certiorari should be granted here because of principles or policies enunciated by the Court in four cited decisions. It can readily be demonstrated that these four cases lend no support to the present insistence of petitioner:

Alcoa Steamship Co. v. United States, 338 U. S. 421, involved a wide-spread principle of American maritime law, and it was said, "At bar is the single question of contract interpretation whether a carrier's 'Goods or Vessel lost or not lost' provision survives the terms of the government standard form bill of lading." That is a far cry from a demand that certiorari be granted to determine whether this Court's evaluation of testimony will be the same as that of a jury.

International Brotherhood of Teamsters, Local 695 v. Vogt, Inc., 354 U. S. 284, involved "the limits imposed by the Fourteenth Amendment on the power of a State to enjoin picketing." Even here, doubt was expressed as to whether or not the case presented a substantial federal question (p. 287). Another noteworthy distinction was described in the dissent of Mr. Justice Douglas, the Chief Justice, and Mr. Justice Black, thus (296):

> "But where, as here, there is no rioting, no mass picketing, no violence, no disorder, no fisticuffs, no coercion—indeed nothing but speech—the principles an-

nounced in Thornhill and Swing should give the advocacy of one side of a dispute First Amendment protection."

In *United States v. Standard Oil Company*, 332 U. S. 301, the Court was "asked to create a new substantive legal liability without legislative aid and as at the common law" touching upon the Government's right to recover from a tort-feasor medical expenses and service pay expended while a soldier was recuperating from injuries. A footnote indicated that "upwards of 450 instances" involved the same problem, "and that additional instances were being reported by the War Department at the rate of approximately 40 a month." From a standpoint of public concern and importance, it would be hard to imagine a situation more dissimilar to the one here presented by petitioner. In fact, in the *Standard Oil* case, the Court suggested that its significance was comparable to *Erie R. Co. v. Tompkins*, 304 U. S. 64. It was also noteworthy that in resolving the problem before it, the Court was not called upon to perform the function of a jury.

Petitioner's argument concerning the relevance of *Local 761, International Union of Electrical, Radio & Machine Workers v. National Labor Relations Board*, 366 U. S. 667, is merely a repetition of its previous unsuccessful insistence in its petition for writ of certiorari in the *Gilchrist* case. In brief, petitioner interprets *Local 761* as establishing a comprehensive and inflexible criterion whereby all alleged secondary boycotts involving activity at or near a struck employer's premises can be readily catalogued. The only factors involved in this formula, as viewed by petitioner, are those of geographical conditions and character of work performed by neutral employees. According to this theory, there cannot possibly be any secondary boycott unless (1) there is a "second gate" and

(2) the neutral employees are performing tasks unrelated and unnecessary to the conduct of the primary employer's ordinary business. The absence of either of these two requisites automatically excludes the possibility that a secondary boycott is in progress.

As pointed out by respondents in the *Gilchrist* case, this is not a proper interpretation of *Local 761* because it completely ignores the *objective* of the striking union. In *Local 761* the Court made it clear that inducement or encouragement which naturally and incidentally results from peaceful and traditional picketing, by enlisting the sympathies of third parties, is not proscribed by the Act merely because the picketing union hopes for such result, and can therefore be said to have it as an objective. This is true of peaceful picketing at a primary employer's job site (or gate), though not used by the struck employer's employees, but used by neutral employees performing work necessary to the normal operations of the business. However, this Court did not say or infer that violent, deliberate and intentional coercion of the employees of neutral persons to a concerted action, with the aggressive and immediate purpose of involving neutral parties, and through them exerting pressure upon a primary employer, is protected or outside the scope of conduct forbidden by the Act simply because of the location of the activity. On the contrary, the Court noted that "the distinction between legitimate 'primary' activity' and banned 'secondary activity' * * * does not present a glaringly bright line" (p. 673), and reviewed the history of the Board's interpretation of § 8(b)(4)(A) in light of "unfolding variant situations," stating (p. 674):

> "* * * the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause.

> Although no rigid rule which would make * * * a few factors conclusive is contained in or deducible from the statute, * * * in the absence of admissions by the union of an illegal intent, the nature of the acts performed show the intent."

Petitioner continues to point to *National Labor Relations Board v. International Rice Milling Company*, 341 U. S. 665, in support of the proposition that "violence on the picket line is not material."[11] In *Rice Milling* the Court also said (p. 672), "It is the *object*[12] of union encouragement that is proscribed by that section, rather than the means adopted to make it felt."

Since objectives are the determinative element by which secondary boycotts are identified, and the nature of the acts performed show the intent (or objective), it is not an accurate premise to quote this Court as establishing the undiluted principle that violence is "not material" in determining the motives and intent behind a given pattern of conduct.

This was no case of "inducements or encouragements reaching individual employees of neutral employers only as they happen(ed) to approach the picketed place of business," such as was described in *International Rice Milling* (p. 671). Neither was it a case where a union carried on peaceful picketing in the *hope* that all persons would honor the picket line, such as was discussed in *Local 761* (p. 673). In this instance the petitioner's adherents saw to it that neutrals would not only be influenced, but would be forced to cease doing any business with the employers who were the objects of its activity. It did not *hope* that the sympathies of neutral truck drivers would be enlisted, and they would thereby be induced to withhold

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[11] Usually omitting the words "In the instant case."

[12] Emphasis supplied.

services. On the contrary, petitioner's proponents utilized every form of unabashed violence to see to it that truckers were driven off the job. Petitioner's pickets activated themselves not only at the business location of their targets, but prowled throughout the whole area in motorcades and convoys so gigantic as to admit of no possible interpretation other than an intent to intimidate. The wage agreement which was the core of this drive speaks for itself, and respondents interpret it as nothing more nor less than a thinly-veiled compact to the effect that the parties to the contract would refuse to do any sort of business with those who were not signatories (R. 29a-34a).

Petitioner argues that inducement of truckers was not secondary activity because the truckers were not "independent" or "neutral." This same contention was belabored in the petition for writ of certiorari in the *Gilchrist* case, and with just as little evidence to justify it. Petitioner declares (p. 28) "Moreover, as between Companies and the truckers, far more than the ordinary arms-length relationship existed. Though Mrs. Collins asserted truck drivers were not under her control (R. 75a), obvious and elemental economic circumstances and necessity placed each under the practical control of Mrs. Collins, as the person in control of the three operations." Significantly, no record citation is made in support of this gratuity from petitioner. Not only did Mrs. Collins state that truckers were not under her control, but the truckers also so indicated (R. 219a, 223a, 230a, 256a). An assertion that these neutrals were "each under the practical control of Mrs. Collins" is surprising. Ray Proffitt (R. 222a), Hubert Hall (R. 229a), Jedd Duncil (R. 258a), and Aubrey Nichols (R. 262a) all testified that they were hauling coal

for several operators, among whom Mrs. Collins was only one.

Finally, petitioner repeats the familiar insistence that "incidents relating to the L & N train crew do not fall within the scope of Section 303 because they concern railroad employees excluded by the Act's definitions of 'employer' and 'employee' ". (p. 32.) Petitioner concedes, as it must, that all judicial authority is to the contrary,[13] but argues that this is at odds with congressional intent because a recent amendment to the Act changes the phrase "employees of any employer" to read "any individual employed by any person." It is said that this amendment would have been unnecessary had Congress originally intended to include railroad employees within the proscriptions of the Act, and it quotes legislative history and remarks of legislators. This is a peculiar argument. Congress was confronted with conflicting interpretations of an Act. It was the Board's interpretation that railroad employees were excluded from that Act. Courts were unanimously of an opposing view. Congress resolved this divergence of opinion by taking action which coincided with decisions of the courts, yet petitioner insists that the Board had been reflecting the intent of Congress. Nothing is cited in the legislative history to indicate that the Congress had experienced a change of conviction. On the contrary, petitioner quotes Senator Curtis (appendix xxi) as desiring to close "loopholes."

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[13] *International Rice Milling Co. v. NLRB*, 5 Cir., 183 F. 2d 21; *W. T. Smith Lumber Co. v. N. L. R. B.*, 5 Cir., 246 F. 2d 129; *Great Northern Railway Co. v. NLRB*, 9 Cir., 272 F. 2d 741; *Superior Derrick Corp. v. NLRB*, 5 Cir., 273 F. 2d 891; *Knapp v. United Steel Workers of America*, D. C. Minn., 179 F. Supp. 90.

On the appeal of *Rice Milling* to this Court, the Board abandoned its contention that railroad employees were outside the ban of § 303. Certiorari was denied in the *Superior Derrick* case, 364 U. S. 816.

At any event, by the very legislation to which petitioner refers, the importance of this debated construction has become moot. In *Rice v. Sioux City Cemetery*, 349 U. S. 70, the Court was faced with a legal problem which had been removed from the realm of future concern by subsequently enacted legislation, and it was determined that such development dissipated that element of " 'special and important reasons' for granting the writ of certiorari." Such is the situation here.

QUESTION NO. 3.

Recovery of punitive damages for violation of common law of Kentucky was proper and is supported by applicable decisions of this Court.

While it is said in the petition that the Court of Appeals did not respond to petitioner's argument questioning the allowance of punitive damages (Petition, p. 39), this was one of the five points, out of the fourteen points raised, which the lower court specifically dealt with, ruling thereon as follows (Appendix to Petition, v):

> "(4) *Punitive Damages.* The defendant claims that punitive damages were not recoverable. Under facts so similar to what the evidence here disclosed as to provide appropriate precedent, we held that it was permissible to allow punitive damages. United Mine Workers of America v. Osborne Mining Company, supra; Gilchrist v. United Mine Workers, supra. We need not add here to what was said in those cases."

This argument of the inability of the court to allow recovery of punitive damages where any violation of a provision of the Labor Management Relations Act is involved has been repeatedly raised on behalf of union defendants beginning with the case of *United Construction Workers v. Laburnum Construction Corporation*, 347 U.

S. 656, where this argument was first rejected. In the later case of *International Union, U. A., A. & A. I. W. v. Russell*, 356 U. S. 634, this point was again raised and it was discussed at length in the opinion of the Court. In that case, it was urged, as here, that as the act afforded Russell compensatory relief, he was deprived of common law rights of action for all damages suffered. Again the Court rejected this argument of the union saying that the provision of some compensatory relief in the Act did not mean that Congress necessarily intended such relief to constitute an exclusive pattern for money damages for private injuries, for if an aggrieved party's "common-law rights of action against a union tort-feasor are to be cut off, that would in effect grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed during the strike in the present case" (p. 645). Thereafter, the Court refused to grant certiorari in *Meadow Creek, Osborne Mining Company* and *Gilchrist*, in each of which the Court of Appeals for the Sixth Circuit sustained an award of punitive damages.

That punitive damages constitute a well-settled form of relief under the law of Kentucky when there is a wilful and malicious wrong is apparent from the decision in the case of *United Construction Workers v. Laburnum Construction Corporation*, 194 Va. 872, 75 S. E. 2d 694, 347 U. S. 656. In that case, in which the violent conduct of the union followed a similar pattern to that in the present case, the Court approved the allowance by a jury of $100,000.00 punitive damages. See also the case of *Engelman v. Caldwell and Jones*, 243 Ky. 23, 47 S. W. 2d 971; and *L. & N. Railroad Company v. Ritchel*, 148 Ky. 701, 147 S. W. 411.

This same general pattern of conduct in both the *Laburnum* case and in the present case was substantially similar in most respects to that pattern portrayed in the *Meadow Creek* case, in the *Osborne* case, and in the *Gilchrist* case, in all of which punitive damages were allowed. Here, as noted in the opinion of the Court of Appeals (Appendix to Petition, ii), there was "mass picketing" with pickets "sometimes numbering in excess of a thousand men" with this "persuasion of sheer numbers" being "supplemented by more violent and forceful methods, such as trucks being stopped and their loads dumped," "mine and tipple workers were beaten," "strong threats of violence were made to the independent truck drivers," "the Flame tipple was put under gunfire from the nearby hills almost daily" and "on eight different occasions, the railroad spur track leading to the tipple was dynamited."

As pointed out in the opinion in the case of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 247-248, it was this type of conduct "marked by violence and imminent threats to the public order" and "intimidation and threats of violence" which supported the allowance of the remedy of punitive damages under state law in the *Laburnum* and *Russell* cases.

It is evident that under the facts in this case, the decision of the Court of Appeals, in approving the award of punitive damages, is in full accord with the case decisions of this Court on the subject.

QUESTION NO. 4.

Petitioner failed to comply with Rule 51, Federal Rules of Civil Procedure, upon district court's refusal to give offered instruction, although, had proper objection been taken, complaint that court's ruling is erroneous is without merit.

Question 4 presented in the petition is based upon charge of error in the trial court's "refusing an instruction proffered by the union charging the jury on the elements essential to a finding that the statute has been violated" (Petition, 4), the statute referred to being Section 303, Labor Management Relations Act, 1947, and the proffered instruction being petitioner's Instruction IV. Such exception as was taken to this instruction was tacked on to an objection to the trial court's instruction relating to secondary boycott in the following manner (R. 484a):

> "The Court erred in its instruction with reference to the secondary boycott provision as sued upon in the complaint in that the Court did not define the boycott in terms of the Statute—that is, Section 303 of the Labor Management Relations Act of 1947, *and the Court erred in refusing to give Instruction Numbers 4 and 5 with reference to the boycott as tendered by the defendant.*" (Italics added.)

Rule 51, Federal Rules of Civil Procedure, Title 28, U. S. C. A., provides that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

It is submitted that the exception taken by petitioner does not sufficiently comply with the provisions of Rule 51, so as to permit review of the alleged error.

In applying the provisions of Rule 51 in the case of

Palmer v. Hoffman, 318 U. S. 109, 119, the Court stated:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

The Courts of Appeals have consistently held that an exception as general as that taken by the petitioner in this case does not sufficiently comply with Rule 51 so as to permit review of the alleged error. *Detroit Edison Company v. Striker*, 6 Cir., 65 F. 2d 126; *Johnson v. Chesapeake and Ohio Railway Company*, 7 Cir., 227 F. 2d 858; *Hansen v. St. Joseph Fuel Oil & Manufacturing Co.*, 8 Cir., 181 F. 2d 880, cert. denied 340 U. S. 865; *Richfield Oil Corporation v. Karseal Corporation*, 9 Cir., 271 F. 2d 709, 343 U. S. 922.

Refusal of the trial court to give petitioner's Instruction IV was one of the fourteen points raised by it in the court below, however, the Court of Appeals did not consider it to be of such merit as to require discussion (Appendix to Petition, iii).

Had petitioner properly complied with the mandate of Rule 51, neverthless, its claim of error cannot be supported. In the first place, the instruction was improper as it limited all violations charged against the petitioner to those where the object of the union "was either to force plaintiffs to cease doing business with another person or to force plaintiffs and other employers to recognize the union as representatives of their employees" (R. 466a; Petition 40). This would eliminate the union's activity, as shown under the evidence, whereby the employees of

other employers were encouraged and induced to force their employers to cease doing business with the respondents.

The offered instruction was improper for the further reason that it made it necessary for the jury to find that the petitioner had in fact violated Section 303 of the Labor Management Relations Act of 1947 before it could consider the asserted violations of the common law of the state. In other words, this instruction, in effect, would change the established doctrine of ancillary or pendent jurisdiction, under which, as pointed out in the early case of *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175, 191, where the trial court acquires jurisdiction by reason of a federal question involved, the court has "the right to decide all questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

While petitioner complains that the instructions of the district court omitted "the essential element of the strike and picketing's object" and failed to distinguish "between objects of picketing which fall within Section 303's ban and those which do not" (Petition, 41), and insists that for this reason its proffered Instruction IV should have been given, such complaint is without a valid basis when the charge is considered as a whole.

Instructions must be considered as a whole from the point of view of the impression they would seem to convey to a jury of laymen, and not in their individual parts. *Allers v. Bohmker*, 7 Cir., 199 F. 2d 790; *Rosenfeld v. Curtis Publishing Company*, 2 Cir., 163 F. 2d 660; *Southern Railway Company v. Jones*, 6 Cir., 228 F. 2d 203. As stated in the latter case (p. 211), "Paragraphs

lifted from a charge for critical purposes are often confusing or misleading."

Petitioner quotes in its petition (p. 11) certain incomplete parts of a paragraph and says that this was the trial court's charge on secondary boycott. At the point where the extracted, partial quotation ends, the court's charge continues as follows (R. 474a-475a):

> "You have a right to strike against your own employer. The right to strike is a right that must be recognized as one of the guaranteed liberties of our country and of our kind of government. But you do not have a right to have a sympathy strike in the sense that you would go out and cause damages to someone to get them or to get some other person to come into or agree to a contract.
>
> "The defendant had no right to go upon the property of the plaintiffs and menace or threaten their employees, or to place their employees in fear of their jobs, or their life, or of bodily harm.
>
> "Neither did the defendant have a right to interfere with the truck drivers in delivering coal to the ramp and tipple of plaintiffs, nor in leaving after they had delivered it. The defendant, nor any of its members, or the organization, had a right to use against the truck drivers, or the employees of plaintiffs, threats of any kind to induce them to become members of the United Mine Workers of America, or to refrain from commercial relations with the plaintiffs, their employees or independent contractors, for the handling of plaintiffs' coal."

And again, the court said (477a):

> "You are instructed that the defendant had a right to solicit membership in its organization and to use all peaceful means and persuasion to induce persons to become members of the United Mine Workers. For the purpose of carrying out a lawful drive for member-

ship, the defendant and its members had a right to attend at any place where any prospective person or persons for membership might lawfully be for the purpose of peacefully obtaining or communicating information or for peacefully persuading any person to work or to abstain from working.

"In other words, they had a right to go out and solicit membership, they had a right to reason, to argue, to induce in any lawful way a person to become a member in the United Mine Workers, so long as they did not commit unlawful acts.

"The defendants, its officers and members, had a right to picket by peaceful means and by reasonable numbers of persons, the plant and operation of the plaintiffs, but did not have a right to carry on a picket line on the property of the plaintiffs or to use such numbers of men that would induce fear of life, bodily harm or property damage to the employees of the plaintiffs or their truck operators."

While petitioner would have the trial court follow the explicit language of the statute, as pointed out by Judge Wyzanski, in the case of *Cape Cod Food Products, Inc., v. National Cranberry Association*, D. C. D. Mass., 119 F. Supp. 900, 907:

"[T]he object of a charge to a jury is not to satisfy an appellate court that you have repeated the right rigmarole of words, but to make jurors who are laymen understand what you are talking about."

A reading of the charge as a whole demonstrates that the jury of laymen were told, in language that they could understand, the factors involved in this action for damages for the wrongful interference by petitioner with the businesses of the respondents, both as to the federal ground and as to the common law ground, and that, rather than committing error in refusing petitioner's Instruction IV,

error would have been committed had the proffered instruction been given.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 349

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

FLAME COAL COMPANY, CO-DEE COAL COMPANY
AND AMANDA COAL COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 349

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

FLAME COAL COMPANY, CO-DEE COAL COMPANY AND AMANDA COAL COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO OPPOSITION BRIEF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD[1]

UMW believes its statements of the case and of the evidence in the certiorari petition are both accurate and plenary. To avoid giving the Court a distorted picture of the events which occurred at Flame's tipple, UMW has detailed separately, and has not commingled therewith, those activities which were detailed as occurring at mining operations of companies unrelated to Flame, Co-Dee and Amanda and with which those three companies had no business relationships. This fact is empha-

[1] The parties will be referred to herein as they were in the certiorari petition. The abbreviation "O.B." refers to Companies' opposition brief, while that of "Pet." refers to the certiorari petition herein and "(Pet. App.)" refers to the appendix to that petition. Unless otherwise indicated, all emphases herein are supplied.

sized in the certiorari petition (pp. 17-20) and the opposition brief offers no challenge thereto.

UMW believes, too, that the questions as presented in its petition raise the issues properly.

Further, because UMW believes that answers to arguments and statements advanced in Companies' opposition brief are to be found in the certiorari petition, no attempt will be made to reply, *seriatim*, thereto. However, the following discussions have relevancy to the Reasons for Granting the Writ, at the same time challenging Companies' statements, arguments and positions.

UMW's Reply to Companies' Argument 1

Answers to Companies' contentions on Argument 1 (O.B. 8-16) are found in UMW's certiorari petition (pp. 20-26).

Companies incorrectly state (Br. 8) that Question 1's jurisdictional question was disposed of in the *Meadow Creek* and *Osborne* cases[2] since neither concerned a common-law claim in a state which, like Kentucky, would not permit a labor union to be used as such. Even in *Gilchrist*[3], as the certiorari petition notes (Pet. 21, fn. 18), activities occurred both in Tennessee wherein a union may be sued and in Kentucky, in which it may not be sued, *Gilchrist* did not discuss the issue. Companies do not dispute this.

Though Companies inaccurately urge upon this Court that voluntary unincorporated associations are consid-

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[2] *UMWA* v. *Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52; *UMWA* v. *Osborne Mining Co.*, 6 Cir., 279 F. 2d 716.

[3] *Gilchrist* v. *UMWA*, 6 Cir., 290 F. 2d 36. While Companies note this Court denied certiorari in *Meadow Creek* (359 U.S. 1013), *Osborne* (364 U.S. 881) and *Gilchrist* (368 U.S. 875), such refusals import "no expression of opinion on the merits." *Polites* v. *U. S.*, 364 U. S. 426, 433, fn. 9.

ered legal entities in Kentucky, their failure to reply to UMW's citation (Pet. 21) of *Sweeney* v. *City of Louisville*, 309 Ky. 465, 218 S.W. 2d 30, which rejected an action brought against an association as such, is telling.[4]

Nor did either *Meadow Creek*, *Osborne* or *Gilchrist* deal with the question of federal preemption. In the case at bar, Companies' complaint avowed the district court had jurisdiction by virtue of Taft-Hartley's Section 303—nothing else! Since Companies press the district court's jurisdiction of the common-law claim under *Hurn* v. *Oursler*, 289 U. S. 238, a concomitance of consideration must be this Court's reasoning that both claims "so precisely rest upon *identical facts* as to be little more than the equivalent of different epithets to characterize the same group of circumstances" (289 U.S. 246). Companies do not, for they cannot, explain why *Hurn's* thesis does not require implementation of this Court's rule of federal preemption. Instead they aver, and UMW says erroneously, that this question was disposed of in the *Laburnum* and *Russell* cases.[5] Significantly, in its certiorari petition

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[4] Companies' reliance upon *Int. Union of Operating Engineers* v. *Bryan*, 255 S.W. 2d 471, 474 (Ky.), *UMWA* v. *Comer*, 159 Ky. 605, 167 S.W. 891, and *Hotel etc. Employees Local Union No. 181* v. *Miller*, 272 Ky. 466, 114 S.W. 2d 501, cited by Companies (O.B. 9, 10) are not supportive of Companies' contention.

In *Operating Engineers*, the court decided only that a non-resident union could be required to produce documents by service of a subpoena duces tecum directed to a resident officer and union representative under the class action statutes (255 S.W. 2d 474).

In *Comer*, there was no objection to the suit by special demurrer or special pleas in abatement for which reason the court permitted judgment to stand.

In *Hotel Employees*, the question of suability was not before the court, which found the union made an appearance to the suit by motion to modify an injunction order.

[5] *United Construction Workers* v. *Laburnum Construction Corporation*, 347 U.S. 656; *International Union, U.A.A. etc.* v. *Russell*, 356 U.S. 634.

(pp. 23-4), UMW's reasons for *Laburnum's* inapplicability are delineated, and Companies do not answer UMW's contention that, unlike *Laburnum*, which involved the Act's Section 8(b) (1)(A), wherein this Court rejected the preemption doctrine because the Act "sets up no general compensatory procedure", Section 303 specifically so provides. Like *Laburnum*, *Russell* was a state court action; neither involved the issue of diversity of citizenship which is lacking here. Like *Laburnum*, *Russell* held federal preemption inappropriate because the federal act involved did not provide a remedy for recovery of damages for the activities proscribed. Section 303 does so provide, and the Supreme Court so noted in *Laburnum*, declaring (347 U.S. 665):

> "One instance in which the Act prescribes judicial procedure for the recovery of damages caused by unfair labor practices is that with reference to the jurisdiction of federal and other courts to adjudicate claims *for damages resulting from secondary boycotts. In that instance the Act expressly authorizes a recovery of damages. . . .*"

Though Companies cite (O.B. 12-14) various cases to support their view that the district court had jurisdiction over the nonfederal claim under the pendent jurisdiction doctrine, not a single case so cited involved the core issues of the question posed in UMW's Question 1, namely, whether the pendent jurisdiction doctrine permits a nonfederal claim when Kentucky itself would not permit a suit based thereon against the union in its common name and whether the doctrine of federal preemption precluded the applicability of the pendent jurisdiction doctrine (see UMW's Question 1, Pet. 3). These crucial factors are avoided and ignored in Companies' statement of their Question 1 (O.B. 1-2). The Sixth Circuit committed itself

in *French Renovating Co. v. Ray Renovating Co.*, 6 Cir., 170 F. 2d 945 (1948), in interpreting *Hurn v. Oursler*, to the rule that a *sine qua non* to district court jurisdiction required that "both federal and nonfederal causes rest upon substantially identical facts"; and logically therefore by enacting Section 303 Congress would have precluded state action based on such facts. Accord: *Allen v. Barr*, 6 Cir., 196 F. 2d 159. The absence of common facts has been used by other courts to reject the joinder of a nonfederal claim. *Strey v. Devin's Inc.*, 7 Cir., 217 F. 2d 187; *Landstrom v. Thorpe*, 8 Cir., 189 F. 2d 46; *Crabb v. Welden Bros.*, 8 Cir., 164 F. 2d 797; *Eisenmann v. Gould-National Batteries, Inc.*, DC, E.D. Pa., 1958, 169 F. Supp. 862.

Companies' citations (O.B. 12) of patent or trademark cases must be regarded in light of the fact that Congress codified *Hurn* in enacting 28 USC Section 1338, which expressly grants jurisdiction of a "claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws": See Reviser's Note, 28 USCA 1338, p. 108. Reference to the pendent jurisdiction doctrine in Section 1338 and *its absence in the other jurisdictional sections* of the Judicial Code demonstrate clearly that applicability of *Hurn* was restricted to cases arising under that one section.*

Similarly, anti-trust cases cited by Companies (O.B. 13) must be appraised in light of this Court's statements in *Apex Hosiery Mills v. Leader*, 310 U.S. 469, 483-4,

* See "The Proposed Revision of the Federal Judicial Code", 60 Harvard Law Review 424, 431, where it is said: "In restricting the scope of the provision concerning joinder of nonfederal cases question to patents, copyright, and trademark cases, the proponents of the bill *have failed* to take advantage of an opportunity to resolve the large question of such joinder as applied to all types of cases involving original jurisdiction."

that in a "suit, in which no diversity of citizenship of the parties is alleged or shown, the federal courts are without authority to enforce state laws" and in *Hunt v. Crumboch*, 325 U.S. 821, 826, "Whether the respondents' conduct amounts to an actionable wrong subjecting them to liability for damages *under Pennsylvania law is not our concern.*"

UMW's Reply to Companies' Argument 2

UMW counsel are fully aware that certiorari is usually rejected to review a lower court decision turning solely upon an analysis of particular facts. Certiorari is available however where reexamination acquires importance for reasons such as are presented under Reason II in the certiorari petition (pp. 26-34). Only recently did this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, — U.S. —, 8 L. ed. 2d 777, reexamine and evaluate evidence in the light of previous decisions of this Court presenting important questions under federal statutes. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320. That is the present situation where the Sixth Circuit has sustained a secondary boycott charge but to do so, has utilized criteria in conflict with those heretofore enunciated by this Court as necessary to a Section 303 violation, as set forth in the certiorari petition (pp. 26-34).

In citing *Troupe v. Transit Co.*, 2 Cir., 234 F. 2d 253, Companies have overlooked the Second Circuit's statement (p. 258), "We need not here decide whether there is jurisdiction . . . under the *Hurn v. Oursler* doctrine, of a pendent claim of unseaworthiness when combined in one action with a substantial and related claim under the Jones Act, since it *affirmatively appears . . . the district court* had jurisdiction . . . over the unseaworthiness claim *because of diversity of citizenship.*"

Likewise, their citation of *Jordine v. Walling*, 3 Cir., 185 F. 2d 662, 671, fails to note that the Third Circuit declared: "It follows that *in the absence of diversity of citizenship the district court did not have jurisdiction* to entertain the plaintiff's count for maintenance and cure in a civil action tried to a jury."

Petitioners do not, as Companies charge, request a determination on the basis of conflicting evidence; and the question presented in Question 2 is posed as one seeking a review "as a matter of law" (Pet. 3).

It is paradoxical that Companies now emphasize in their brief (p. 19) the element of the *objectives* of the strike and picketing activities, for, as pointed out later herein (post, p. 12), that is an element about which the jury was never instructed although district court jurisdiction was premised upon an alleged Section 303 violation. Further, the Sixth Circuit's opinion does not deal with this vital factor, except to say UMW's "general objective was to require Flame to sign the union's contract" (Pet. App. iv). So it was; but UMW's object was also to have Amenda, Co-Dee and truckers to sign. The Sixth Circuit's interference with the right of primary activity went further, for, to compound its error, it declared a secondary boycott existed because of activities at other mining operations although a union contract was sought at each of such operations which had no business relationship with either of Companies.

Companies undertake to distinguish the case at bar from that of *Local 761*[8] on the basis that the Sixth Circuit herein found there had been violence. After *Local 761* was decided by the Supreme Court, the National Labor Relations Board rejected the same argument now made by Companies.[9] In *Local No. 5895, United Steelworkers of America (Carrier Corporation)*, 132 NLRB 127 (July 13, 1961), cited to but ignored by the Sixth Circuit, the Board declared (132 NLRB 130, fn. 2): "Finally, we take

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[8] *Local 761, International Union of Electrical, etc. Workers v. NLRB*, 366 U.S. 667.

[9] This case is cited in the certiorari petition (p. 29). Pertinently, Companies' brief makes no response to UMW's discussion.

issue . . . that the threatening of railroad personnel and the blocking of train passage at the picket line requires the finding of a Section 8(b)(4)(B) violation here. *Such conduct . . . does not convert primary activity into conduct proscribed by the secondary provisions*", citing and quoting from *International Rice Milling Co., Inc. v. NLRB*, 341 U.S. 665, 672.

The Sixth Circuit (Pet. App. iv), as the certiorari petition directs the Court's attention (Pet. 27), employed the *"separate entity" theory to hold that as to Flame*, both Amanda and Co-Dee were "neutrals", although admittedly UMW sought to have each sign a contract, there was a dispute with each of them, and each therefore was a primary employer. The Sixth Circuit itself admitted all three "are controlled by one person", Virginia Collins (Pet. App. i). UMW submits that as to Flame, neither Amanda nor Co-Dee meets the "neutral" person test reflected by the Act's legislative history discussed in the certiorari petition (pp. 27-28). So, too, as the petition shows (p. 28) a union contract was sought from each truck owner who was a primary employer in the dispute. Furthermore, as the petition (p. 28) shows, they were not "wholly unconcerned" in the dispute between Companies and those seeking to have Virginia Collins recognized UMW as the bargaining representative.

UMW's certiorari petition (p. 27) notes the Sixth Circuit's test has been rejected by the District of Columbia Circuit and the Fifth Circuit, as well as by the Kentucky Court of Appeals; and Companies do not challenge this assertion. Only recently, in *NLRB v. Gibraltar Industries, Inc.*, 4 Cir., — F. 2d —, 51 LRRM 2029 (August 23, 1962), the Fourth Circuit registered its disapproval of the separate entity theory and emphasized the element of control.

Moreover, Companies discussion of *Local 761* demonstrates its misconception of this Court's holding therein. Companies overlook that therein this Court made clear that Section 8(b)(4)(A), Section 303's counterpart, "could not be literally construed", because to do so "would ban most strikes historically considered to be lawful, so-called primary activity" (366 U.S. 672) and that "'Congress did not seek by §8(b)(4), to interfere with the ordinary strike'" (p. 672). Companies ignore, too, this Court's enunciation that where there is an entrance and there is a mingled use thereof, "such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees" and such use is "outside the bar of §8(b)(4)(A)" [366 U.S. 682]. It is a notable fact that Companies ignore too this Court's holding that "The key to the problem is found in the type of work that is being performed by those who use the" gate (366 U.S. 680). Upon remand of *Local 761* to the National Labor Relations Board, that agency held that picketing in *Local 761* "was lawful primary picketing" because the work of the secondary employers was related to the normal operations of the primary employer. See *Local 761, International Union, etc.* (General Electric Company), decided August 28, 1962, 138 NLRB No. 38, 51 LRRM 1028, 1030. In the Board's Local No. 5895, United Steelworkers case (*ante*, p. 7), because "delivery of empty boxcars to Carrier and the transportation of Carrier products—clearly were related to Carrier's normal operations" the Board held there was no secondary boycott activity, thus implementing Local 761's principle that the "key to the problem" is to be found in the type of work being done by those passing through the gate. This was indeed true in the case at bar where coal mined

at Co-Dee and Amanda operations was trucked by truckers to Flame's tipple.

Companies' efforts (O.B. 19-20) to dissipate the importance of the numerous pending cases involving the same questions posed herein merely invites this Court to permit the Sixth Circuit, in interpreting an important federal statute, to continue to ignore, as it did in the case at bar, this Court's criteria enunciated in *Local 761* and other cases discussed in the certiorari petition (pp. 26-34) as essential to a Section 303 violation and thus to set a pattern not only as to the instant and the pending cases but one which may be applied whenever a secondary boycott case arises, thereby clearly frustrating Congress' intent and purpose expressed in the Act's Section 13 that except as Congress—not the Sixth Circuit—diminished the right to strike, nothing should be construed to diminish that right in any way. The Sixth Circuit's attention was directed to *Local 761*, but its opinion ignored it. If the Sixth Circuit deemed it inapposite, it failed to explain its reasons. The Sixth Circuit's pattern of silence may be expected to continue in all secondary boycott litigation unless this Court, upon review by certiorari, corrects the Sixth Circuit's error.

Companies' argument (O.B. 24) that Congress effected no change by making railroad employees subject to the Act must be rejected as attributing to Congress the doing of an useless act and, further, it is opposed by Senate Report No. 187 on S. 1555 (Pet. 33) that "railroad employees . . . are not employees within the meaning of the act".

Companies argument (O.B. 24-25) that Congress' change of the Act's language has rendered moot UMW's position that train crew incidents do not fall within Sec-

tion 303's scope is answered readily by this Court's *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 8 L. ed. 2d 305, 312, wherein it declared that upon holding erroneous one theory of liability upon which a general verdict may have rested, the Supreme Court will reverse a judgment based on such verdict even without exploring the legality of other theories. Moreover, in addition to correcting error in the instant case, correction of the Sixth Circuit's error herein will preclude similar error in the numerous pending cases.

UMW's Reply to Companies' Argument 3

UMW's answer to Companies' insistence that its award of punitive damages is warranted is found in the certiorari petition (pp. 34-39).

UMW *did not*, as Companies charge (O.B. 25), contend the Sixth Circuit did not respond to UMW's argument questioning the allowance of punitive damages. UMW's petition (pp. 34-39) complained the Sixth Circuit approved the jury's award of $50,000.00 punitive damages. Pointing out that the Sixth Circuit did not expressly delineate whether punitive damages were premised upon activity violative of Section 303 or the common-law claim, UMW's complaint was the Sixth Circuit failed to respond to UMW's propositions, *first*, that Section 303 "would not permit punitive damage awards", and, *second*, if based upon the common-law claim, no award could be made thereunder because of the federal preemption doctrine (Pet. 34-39).

As to the first position, Companies offer no answer. They do not deny the efficacy of *UMWA v. Patton*, 4 Cir., 211 F. 2d 742, which specifically rejected the contention that punitive damages are recoverable under Section 303. Companies do not offer answer to UMW's demonstration

that Section 303's legislative history shows positively Congressional intent that punitive damages are not to be awarded under the statute.

To circumvent the importance of this federal legislation, although that is the statute under which the district court's jurisdiction was based, Companies seek to sustain the punitive damage award *by assuming* the award was made under Kentucky's common law. But neither the jury's award nor the Sixth Circuit's opinion warrants that assumption. However, even so assuming, Companies' brief affords no answer to UMW's position that the doctrine of federal preemption rejects the award under Kentucky's common-law rule.

It is no answer to UMW's contention that Congress, in providing for compensatory damages *alone* under Section 303 and denying punitive damages thereunder, foreclosed an award of punitive damages under a common-law claim, for Companies (O.B. 25-26) to rely upon *Laburnum* and *Russell* to support the punitive damage award. As already noted, *(ante,* pp. 3-4) those two cases concerned activities violative of the Act's Section 8(b)(1)(A) and *not Section 303;* they were both state court actions; and what the Supreme Court found lacking in the Act's Section 8(b)(1)(A), namely, *procedures to compensate for tortious conduct banned thereby,* Congress provided in Section 303 for its proscribed activity and the Supreme Court took judicial cognizance thereof in *Laburnum,* as already shown *(ante,* pp. 3-4).

UMW's Reply to Companies' Argument 4

In UMW's Reason IV for granting the writ (Pet. 39-43), UMW complained that although Companies asserted district court jurisdiction under the Act's Section 303, at no time was the jury ever advised of the elements con-

stituting a violation of that statute and particularly the element of the *object* of the strike and picketing. UMW's proffered but rejected charge would have supplied the elements and corrected so vital an error. The error thus made was compounded by the district court's erroneously defining a secondary boycott (Pet. 11-12).[10]

The district court's charge, quoted in Companies' opposition brief (pp. 31-32), demonstrates fully and clearly the lack of any concern as to the *object* of the activities of which Companies complained, despite Companies' argument in another portion of its brief of that element's importance (O.B. 18-19). Companies' profession that the charge sufficed is to be tested by their failure to denote specific language which covers this vital factor, even in substance.

If Section 303's elements are immaterial, then upon what basis did Companies assert federal jurisdiction? If such elements were asserted solely to warrant federal jurisdiction, and then abandoned, then such asserted jurisdiction is frivolous and condemned under *Bell* v. *Hood*, 327 U.S. 678, in which event the issue of diversity of citizenship as a basis for federal jurisdiction becomes crucial and, in this case, lacking (see Pet. 21 et seq.).

This Court in Local 761 verbalized on the difficulty federal courts and the labor board have experienced in interpreting Section 303. It was voiced also by Circuit Judge Prettyman in *Retail Clerk's Union Local 770 v. NLRB*, D.C. Cir., 296 F. 2d 368, 374, when, referring to Section 8(b)(4)(A), he said, *"This case brings into*

[10] Companies' statement (O.B. 29) that the Sixth Circuit did not consider the trial court's refusal to give Instruction IV "of such merit" to require discussion is incorrect. What the appellate court stated was, "We discuss such of them [questions involved] as we consider require it" (Pet. App. iii).

focus the difficulties and complexities of administering this section of the statute." This demonstrates the positive necessity that a jury charge be given with utmost clarity, precision and completeness. Because Companies added a common-law violation to the complexities attending Section 303, it was vital that the trial court apprise the jury with the distinctions involved so that jurors would have been properly guided.

Companies' effort to circumvent the problem posed in UMW's Reason IV (Question 4), whereby the issue of UMW's liability was never properly submitted, by charging UMW's failure to object properly to the district court's jury charge must be rejected under Sixth Circuit principles heretofore enunciated which Companies totally ignore. *First*, as pointed out in the certiorari petition (p. 42) the Sixth Circuit's *Bellak* v. *United Home Life Ins. Co.*, 6 Cir., 244 F. 2d 623, mandates that a trial court's duty is to charge the jury correctly on material issues; and, *secondly*, while UMW's objection (R. 484a) charged district court error "with reference to the secondary boycott provision . . . in that the Court did not define the boycott in terms of the Statute", at the same time UMW noted "the Court erred in refusing to give Instruction Numbers 4 and 5 [R. 466-7a] with reference to the boycott as tendered by the defendant", and in *Hasselbrink* v. *Speelman*, 6 Cir., 246 F. 2d 34, the Sixth Circuit held that refusal to grant an instruction requested sufficed to bring a claimed error to the court's attention, even though the instruction was not objected to at the proper time. Accord: *City of Knoxville v. Bailey*, 6 Cir., 222 F. 2d 520, 529; *Westchester Fire Inc. Co. v. Hanley*, 6 Cir., 284 F. 2d 409, 418. See also this Court's *Sunkist* case (8 L. ed. 305, 311). Moore's Federal Practice—Rules and Official Forms, As Amended 1961, pp. 682-3 states: "Hence although no timely or prop-

er objection was made, the court's error in instructing on a material issue may be the basis for grant of a new trial by the district court *when it is apparent that a miscarriage of justice may otherwise occur.*"

As the certiorari petition notes (p. 42), where, as here, it is not possible to tell whether the jury believed UMW had violated Section 303 or Kentucky's common law, *and there is error in the court's charge, Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 8 L. ed. 2d 305 (May 28, 1962) holds the verdict cannot be upheld. The existence of pending cases in both the Sixth and Fourth Circuits, as the certiorari petition points out (pp. 42-3) emphasizes the importance of a review of UMW's Question 4.

CONCLUSION

For the reasons discussed herein and in the certiorari petition, the writ prayed for therein should issue.

Respectfully submitted,

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